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INTRODUCTION

TO THE STUDY OF THE

LAW OF THE CONSTITUTION

A. V. DICEY

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TO THE STUDY OF THE

LAW OF THE CONSTITUTION

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BY

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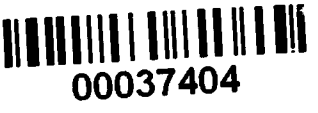
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PREFACE TO THE FIRST EDITION

This book is (as its title imports) an introduction to the study of the law of the constitution; it does not pretend to be even a summary, much less a complete account, of constitutional law. It deals only with two or three guiding principles which pervade the modern constitution of England. My object in publishing the work is to provide students with a manual which may impress these leading principles on their minds, and thus may enable them to study with benefit in Blackstone's *Commentaries* and other treatises of the like nature those legal topics which, taken together, make up the constitutional law of England. In furtherance of this design I have not only emphasised the doctrines (such, for example, as the sovereignty of Parliament) which are the foundation of the existing constitution, but have also constantly illustrated English constitutionalism by comparisons between it and the constitutionalism on the one hand of the United States, and on the other of the French Republic. Whether I have in any

measure attained my object must be left to the judgment of my readers. It may perhaps be allowable to remind them that a book consisting of actually delivered lectures must, even though revised for publication, exhibit the characteristics inseparable from oral exposition, and that a treatise on the principles of the law of the constitution differs in its scope and purpose, as well from a constitutional history of England as from works like Bagehot's incomparable *English Constitution*, which analyse the practical working of our complicated system of modern Parliamentary government.

If, however, I insist on the fact that my book has a special aim of its own, nothing is further from my intention than to underrate the debt which I owe to the labours of the lawyers and historians who have composed works on the English constitution. Not a page of my lectures could have been written without constant reference to writers such as Blackstone, Hallam, Hearn, Gardiner, or Freeman, whose books are in the hands of every student. To three of these authors in particular I am so deeply indebted that it is a duty no less than a pleasure to make special acknowledgment of the extent of my obligations. Professor Hearn's *Government of England* has taught me more than any other single work of the way in which the labours of lawyers established in early times the elementary principles which form the basis

of the constitution. Mr. Gardiner's *History of England* has suggested to me the conclusion on which, confirmed as I found it to be by all the information I could collect about French administrative law, stress is frequently laid in the course of the following pages, that the views of the prerogative maintained by Crown lawyers under the Tudors and the Stuarts bear a marked resemblance to the legal and administrative ideas which at the present day under the Third Republic still support the *droit administratif* of France. To my friend and colleague Mr. Freeman I owe a debt of a somewhat different nature. His *Growth of the English Constitution* has been to me a model (far easier to admire than to imitate) of the mode in which dry and even abstruse topics may be made the subject of effective and popular exposition. The clear statement which that work contains of the difference between our so-called "written law" and "our conventional constitution" originally led me to seek for an answer to the inquiry what may be the true source whence constitutional understandings which are not laws derive their binding power, whilst the equally vigorous statements contained in the same book of the aspect in which the growth of the constitution presents itself to an historian forced upon my attention the essential difference between the historical and the legal way of regarding our institutions, and compelled me to consider whether the habit of looking

too exclusively at the steps by which the constitution has been developed does not prevent students from paying sufficient attention to the law of the constitution as it now actually exists. The possible weakness at any rate of the historical method as applied to the growth of institutions, is that it may induce men to think so much of the way in which an institution has come to be what it is that they cease to consider with sufficient care what it is that an institution has become.

A. V. DICEY.

All Souls College,
Oxford, 1885.

PREFACE TO THE THIRD EDITION

THIS Edition has been carefully revised.

The revision consists mainly in the re-arrangement of the subject-matter. The division into lectures has been abandoned. The first lecture appears as what in its nature it really is—an introduction to the main thesis of the book. The rest of the treatise is distributed into parts and chapters. The parts correspond with and bring into prominence the three leading branches of the work; each of the chapters is devoted to some special but subordinate topic, such, for example, as the right to personal freedom, or the contrast between French *droit administratif* and the rule of law prevailing in England.

This Edition further contains a good deal of new matter.

Most of this new matter is to be found in the Notes which make up the Appendix. To three of these Notes it may be allowable to direct the special attention of readers. Note I. presents in the merest outline some marked characteristics of French con-

stitutionalism. It will have attained its object if it induces serious inquirers to study the invaluable lessons to be drawn from French experiments in the art of constitution-making. Notes III. and IV. should be read together. The substance of them has already appeared in the *Contemporary Review*. They answer several questions connected with the right of public meeting, and trace the difficulties besetting the law of public meeting to their true source—the admitted obscurity of the principles determining the legal limits to the right of self-defence.

My thanks are due to various friends, and especially to Mr. H. Jenkyns, of the Parliamentary Counsel Office, for valuable help in the detection and correction of errors which had hitherto escaped my notice.

A. V. D.

July 1889.

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INTRODUCTION

THE TRUE NATURE OF CONSTITUTIONAL LAW

Optimistic view of English constitution.

"GREAT critics," writes Burke in 1791, "have taught us "one essential rule. . . . It is this, that if ever we should "find ourselves disposed not to admire those writers "or artists, Livy and Virgil for instance, Raphael or "Michael Angelo, whom all the learned had admired, "not to follow our own fancies, but to study them until "we know how and what we ought to admire; and if "we cannot arrive at this combination of admiration "with knowledge, rather to believe that we are dull, "than that the rest of the world has been imposed on. "It is as good a rule, at least, with regard to this ad- mired constitution (of England). We ought to under- stand it according to our measure; and to venerate where we are not able presently to comprehend."[1]

"No unbiassed observer," writes Hallam in 1818, ho derives pleasure from the welfare of his species, fail to consider the long and uninterruptedly in- sing prosperity of England as the most beautiful nomenon in the history of mankind. Climates propitious may impart more largely the mere ents of existence; but in no other region have

[1] Burke, *Works*, iii. (1872 ed.), p. 114.

" the benefits that political institutions can confer, been
" diffused over so extended a population; nor have any
" people so well reconciled the discordant elements of
" wealth, order, and liberty. These advantages are
" surely not owing to the soil of this island, nor to the
" latitude in which it is placed; but to the spirit of its
" laws, from which, through various means, the charac-
" teristic independence and industriousness of our
" nation have been derived. The constitution, there-
" fore, of England must be to inquisitive men of all
" countries, far more to ourselves, an object of superior
" interest; distinguished, especially, as it is from all
" free governments of powerful nations, which history
" has recorded, by its manifesting, after the lapse of
" several centuries, not merely no symptom of irretriev-
" able decay, but a more expansive energy."[1]

These two quotations from authors of equal though of utterly different celebrity, recall with singular fidelity the spirit with which our grandfathers and our fathers looked upon the institutions of their country. The constitution was to them, in the quain language of George the Third, "the most perfect human formations;"[2] it was to them not a me polity to be compared with the government of a other state, but so to speak a sacred mystery of sta manship; it "had (as we have all heard from our y up) not been made but had grown;" it was the not of abstract theory but of that instinct whic supposed) has enabled Englishmen, and especia

[1] Hallam, *Middle Ages* (12th ed.), ii. p. 267. Nothing gi vivid idea of English sentiment with regard to the constitut the end of the last century than the satirical picture of n to be found in Goldsmith's *Citizen of the World*, Letter IV

[2] See Stanhope, *Life of Pitt*, i. App. p. 10.

civilised Englishmen, to build up sound and lasting institutions, much as bees construct a honeycomb, without undergoing the degradation of understanding the principles on which they raise a fabric more subtlely wrought than any work of conscious art. The constitution was marked by more than one transcendent quality which in the eyes of our fathers raised it far above the imitations, counterfeits, or parodies, which have been set up during the last hundred years throughout the civilised world; no precise date could be named as the day of its birth; no definite body of persons could claim to be its creators, no one could point to the document which contained its clauses; it was in short a thing by itself, which Englishmen and foreigners alike should "venerate, where they are not able presently to comprehend."

Modern view of constitution.

The present generation must of necessity look on the constitution in a spirit different from the sentiment either of 1791 or of 1818. We cannot share the religious enthusiasm of Burke, raised as it was to the temper of fanatical adoration by just hatred of those "doctors of the modern school," who, when he wrote, were renewing the rule of barbarism in the form of the reign of terror; we cannot exactly echo the fervent self-complacency of Hallam, natural as it was to an Englishman who saw the institutions of England standing and flourishing, at a time when the attempts of foreign reformers to combine freedom with order had ended in ruin. At the present day students of the constitution wish neither to criticise, nor to venerate, but to understand, and a professor whose duty it is to lecture on constitutional law, must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of a eulogist, but simply of

an expounder; his duty is neither to attack nor to defend the constitution but simply to explain its laws. He must also feel that however attractive be the mysteries of the constitution, he has good reason to envy professors who belong to countries such as France, Belgium, or the United States, endowed with constitutions of which the terms are to be found in printed documents, known to all citizens and accessible to every man who is able to read. Whatever may be the advantages of a so-called "unwritten" constitution, its existence imposes special difficulties on teachers bound to expound its provisions. Any one will see that this is so who compares for a moment the position of writers such as Kent or Story, who commented on the constitution of America, with the situation of any person who undertakes to give instruction in the constitutional law of England.

When these distinguished jurists delivered in the form of lectures commentaries upon the Constitution of the United States, they knew precisely what was the subject of their teaching and what was the proper mode of dealing with it. The theme of their teaching was a definite assignable part of the law of their country; it was recorded in a given document to which all the world had access, namely, "the Constitution of the United States established and ordained by the People of the United States." The articles of this constitution fall indeed far short of perfect logical arrangement; and they lack absolute lucidity of expression, but they contain in a clear and intelligible form, the fundamental law of the Union. This law (be it noted) is made and can only be altered or repealed in a way different from the method by which other

enactments are made or altered; it stands forth, therefore, as a separate subject for study; it deals with the legislature, the executive, and the judiciary, and by its provisions for its own amendment, indirectly defines the body in which resides the legislative sovereignty of the United States. Story and Kent therefore knew with precision the nature and limits of the department of law on which they intended to comment; they knew also what was the method required for the treatment of their topic. Their task as commentators on the constitution was in kind exactly similar to the task of commenting on any other branch of American jurisprudence. The American lawyer has to ascertain the meaning of the Articles of the Constitution in the same way in which he tries to elicit the meaning of any other enactment. He must be guided by the rules of grammar, by his knowledge of the common law, by the light (occasionally) thrown on American legislation by American history, and by the conclusions to be deduced from a careful study of judicial decisions. The task, in short, which lay before the great American commentators, was the explanation of a definite legal document in accordance with the received canons of legal interpretation. Their work, difficult as it might prove, was work of the kind to which lawyers are accustomed, and was to be achieved by the use of ordinary legal methods. Story and Kent indeed were men of extraordinary capacity, so however were our own Blackstone, and at least one of Blackstone's editors. If, as is undoubtedly the case, the American jurists have produced commentaries on the constitution of the United States utterly unlike, and, one must in truth

add, vastly superior to any commentaries on the constitutional law of England, their success is partly due to the possession of advantages denied to the English commentator or lecturer. His position is entirely different from that of his American rivals. He may search the statute-book from beginning to end, but he will find no enactment which purports to contain the articles of the constitution; he will not find any test by which to discriminate laws which are constitutional or fundamental from ordinary enactments; he will discover that the very term "constitutional law," which is not (unless my memory deceives me) ever employed by Blackstone, is of comparatively modern origin; and in short, that before commenting on the law of the constitution he must make up his mind what is the nature and the extent of English constitutional law.[1]

Commentator seeks help from constitutional lawyers, constitutional historians and constitutional theorists.

His natural, his inevitable resource is to recur to writers of authority on the law, the history, or the practice of the constitution. He will find (it must be admitted) no lack of distinguished guides; he may avail himself of the works of lawyers such as Blackstone, of the investigations of historians such as Hallam or Freeman, and of the speculations of philosophical theorists such as Bagehot or Hearn. From each class he may learn much, but for reasons which I am about to lay before you for consideration, he is

[1] See this point brought out with great clearness by Monsieur Boutmy, *Études de Droit Constitutionnel* (1st ed.), p. 9. Monsieur Boutmy well points out that the sources of English constitutional law may be considered fourfold, namely—(1) Treaties or Quasi-Treaties, *i.e.* the Acts of Union; (2) the Common Law; (3) Solemn Agreements (pacts), *e.g.* the Bill of Rights; (4) Statutes. This mode of division is not exactly that which would be naturally adopted by an English writer, but it calls attention to distinctions often overlooked between the different sources of English constitutional law.

liable to be led by each class of authors somewhat astray in his attempt to ascertain the field of his labours and the mode of working it; he will find, unless he can obtain some clue to guide his steps, that the whole province of so-called "constitutional law" is a sort of maze in which the wanderer is perplexed by unreality (by what, if I might venture to do so, I would call "shams"), by antiquarianism and by conventionalism.

I. Lawyer's view of constitution. Its unreality. Blackstone.

Let us turn first to the lawyers, and as in duty bound to Blackstone.

Of constitutional law as such there is not a word to be found in his *Commentaries*. The matters which appear to belong to it are dealt with by him in the main under the head Rights of Persons. The Book which is thus entitled treats (*inter alia*) of the Parliament, of the King and his title, of master and servant, of husband and wife, of parent and child. The arrangement is curious and certainly does not bring into view the true scope or character of constitutional law. This, however, is a trifle. The Book contains much real learning about our system of government. Its true defect is the hopeless confusion both of language and of thought, introduced into the whole subject of constitutional law by Blackstone's habit—common to all the lawyers of his time—of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional King, the whole and perhaps more than the whole of the powers actually possessed and exercised by William the Conqueror.

"We are next," writes Blackstone, "to consider "those branches of the royal prerogative, which invest

" thus our sovereign lord, thus all-perfect and immortal
" in his kingly capacity, with a number of authorities
" and powers; in the exertion whereof consists
" the executive part of government. This is wisely
" placed in a single hand by the British constitution,
" for the sake of unanimity, strength, and dispatch.
" Were it placed in many hands, it would be subject
" to many wills: many wills, if disunited and drawing
" different ways, create weakness in a government; and
" to unite those several wills, and reduce them to one, is
" a work of more time and delay than the exigencies of
" state will afford. The King of England is, therefore,
" not only the chief, but properly the sole, magistrate
" of the nation; all others acting by commission from,
" and in due subordination to him; in like manner as,
" upon the great revolution of the Roman state, all the
" powers of the ancient magistracy of the common-
" wealth were concentrated in the new Emperor: so
" that, as Gravina expresses it, *in ejus unius persona*
" *veteris reipublicae vis atque majestas per cumulatas*
" *magistratuum potestates exprimebatur.*"[1]

The language of this passage is impressive; it stands curtailed but in substance unaltered in Stephen's *Commentaries*. It has but one fault; the statements it contains are the direct opposite of the truth. The executive of England is in fact placed in the hands of a committee called the Cabinet. If there be any one person in whose single hand the power of the State is placed, that one person is not the Queen but the chairman of the committee, known as the Prime Minister. Nor can it be urged that Blackstone's description of the royal authority was a

[1] Blackstone, *Commentaries*, i. (Christian's ed.), p. 249.

true account of the powers of the King at the time when Blackstone wrote. George the Third enjoyed far more real authority than has fallen to the share of any of his descendants. But it would be absurd to maintain that the language I have cited painted his true position. The terms used by the commentator were, when he used them, unreal, and known[1] to be so. They have become only a little more unreal during the century and more which has since elapsed. "The King," he writes again, "is considered in domestic affairs "... as the fountain of justice, and general con- "servator of the peace of the kingdom. ... He there- "fore has alone the right of erecting courts of judica- "ture: for, though the constitution of the kingdom hath "entrusted him with the whole executive power of the

[1] The following passage from Paley's *Moral Philosophy*, published in 1785, is full of instruction. "In the British, and possibly in all "other constitutions, there exists a wide difference between the actual "state of the government and the theory. The one results from the "other; but still they are different. When we contemplate the *theory* of "the British government, we see the King invested with the most "absolute personal impunity; with a power of rejecting laws, which "have been resolved upon by both Houses of Parliament; of conferring "by his charter, upon any set or succession of men he pleases, the "privilege of sending representatives into one House of Parliament, as by "his immediate appointment he can place whom he will in the other. "What is this, a foreigner might ask, but a more circuitous despotism? "Yet, when we turn our attention from the legal existence to the actual "exercise of royal authority in England, we see these formidable "prerogatives dwindled into mere ceremonies; and in their stead, a sure "and commanding influence, of which the constitution, it seems, is totally "ignorant, growing out of that enormous patronage, which the increased "extent and opulence of the Empire has placed in the disposal of the "executive magistrate."—Paley, *Moral Philosophy*, Book vi. cap. vii. The whole chapter whence this passage is taken repays study. Paley sees far more clearly into the true nature of the then existing constitution than did Blackstone. It is further noticeable that in 1785 the power to create Parliamentary boroughs was still looked upon as in theory an existing prerogative of the Crown. The power of the Crown was still large, and rested in fact upon the possession of enormous patronage.

"laws, it is impossible, as well as improper, that he "should personally carry into execution this great and "extensive trust: it is consequently necessary, that "courts should be erected to assist him in executing "this power; and equally necessary, that if erected, "they should be erected by his authority. And hence it "is, that all jurisdictions of courts are either mediately "or immediately derived from the Crown, their pro- "ceedings run generally in the King's name, they pass "under his seal, and are executed by his officers."[1] Here we are in the midst of unrealities or of fictions. Neither the Queen nor the Executive has anything to do with erecting courts of justice. We should rightly conclude that the whole Cabinet had gone mad if to-morrow's Gazette contained an order in council not authorised by statute erecting a new Court of Appeal. It is worth while here to note what is the true injury to the study of law produced by the tendency of Blackstone, and other less famous constitutionalists, to adhere to unreal expressions. The evil is not merely or mainly that these expressions exaggerate the power of the Crown. For such conventional exaggeration a reader could make allowance, as easily as we do for ceremonious terms of respect or of social courtesy. The harm wrought is, that unreal language obscures or conceals the true extent of the powers, both of the Queen and of the Government. No one, indeed, but a child, fancies that the Queen sits crowned on her throne at Westminster, and in her own person administers justice to her subjects. But the idea entertained by many educated men that an English King or Queen reigns without taking any

[1] Blackstone, *Commentaries*, i. p. 267.

part in the government of the country, is not less far from the truth than the notion that Queen Victoria ever exercises judicial powers in what are called her Courts. The oddity of the thing is that to most Englishmen the extent of the authority actually exercised by the Crown, and the same remark applies (in a great measure) to the authority exercised by the Prime Minister, and other high officials, is a matter of conjecture. We have all learnt from Blackstone, and writers of the same class, to make such constant use of expressions which we know not to be strictly true to fact, that we cannot say for certain what is the exact relation between the facts of constitutional government, and the more or less artificial phraseology, under which they are concealed. Thus to say that the Queen appoints the Ministry is untrue; it is also, of course, untrue to say that she creates courts of justice; but these two untrue statements each bear a very different relation to actual facts. Moreover, of the powers ascribed to the Crown, some are in reality exercised by the Government, whilst others do not in truth belong either to the King or to the Ministry. The general result is that the true position of the Crown as also the true powers of the Government are concealed under the fictitious ascription to the sovereign of political omnipotence, and the reader of, say the first Book of Blackstone, can hardly discern the facts of law with which it is filled under the unrealities of the language in which these facts find expression.

II. Historian's view of constitution. Its antiquarianism.

Let us turn from the formalism of lawyers to the truthfulness of our constitutional historians.

Here a student or professor troubled about the nature of constitutional law finds himself surrounded

by a crowd of eminent instructors. He may avail himself of the impartiality of Hallam: he may dive into the exhaustless erudition of the Bishop of Oxford: he will discover infinite parliamentary experience in the pages of Sir Thomas May, and vigorous common sense, combined with polemical research, in Mr. Freeman's *Growth of the English Constitution*. Let us take this book as an excellent type of historical constitutionalism. The *Growth of the English Constitution* is known to every one. Of its recognised merits, of its clearness, of its accuracy, of its force, it were useless and impertinent to say much to an audience who know, or ought to know, every line of the book from beginning to end. One point, however, deserves especial notice. Mr. Freeman's highest merit is his unrivalled faculty for bringing every matter under discussion to a clear issue. He challenges his readers to assent or deny. If you deny you must show good cause for your denial, and hence may learn fully as much from rational disagreement with our author as from unhesitating assent to his views. Take, then, the *Growth of the English Constitution* as a first-rate specimen of the mode in which an historian looks at the constitution. What is it that a lawyer, whose object is to acquire the knowledge of law, will learn from its pages? A few citations from the ample and excellent head notes to the first two chapters of the work answer the inquiry.

They run thus:—

The Landesgemeinden of Uri and Appenzell; their bearing on English Constitutional History; political elements common to the whole Teutonic race; monarchic, aristocratic, and democratic elements to

be found from the beginning; the three classes of men, the noble, the common freeman, and the slave; universal prevalence of slavery; the Teutonic institutions common to the whole Aryan family; witness of Homer; description of the German Assemblies by Tacitus; continuity of English institutions; English nationality assumed; Teutonic institutions brought into Britain by the English conquerors; effects of the settlement on the conquerors; probable increase of slavery; Earls and Churls; growth of the kingly power; nature of kingship; special sanctity of the King; immemorial distinction between Kings and Ealdormen. . . . Gradual growth of the English constitution; new laws seldom called for; importance of precedent; return to early principles in modern legislation; shrinking up of the ancient national Assemblies; constitution of the Witenagemót; the Witenagemót continued in the House of Lords; Gemóts after the Norman Conquest; the King's right of summons; Life Peerages; origin of the House of Commons; comparison of English and French national Assemblies; of English and French history generally; course of events influenced by particular men; Simon of Montfort . . . Edward the First; the constitution finally completed under him; nature of later changes; difference between English and continental legislatures.

All this is interesting, erudite, full of historical importance, and thoroughly in its place in a book concerned solely with the "growth" of the constitution; but in regard to English law and the law of the constitution, the *Landesgemeinden* of Uri, the witness of Homer, the ealdormen, the constitution of the

Witenagemót, and a lot more of fascinating matter are mere antiquarianism. Let no one suppose that to say this is to deny the relation between history and law. It were far better, as things now stand, to be charged with heresy, or even to be found guilty of petty larceny, than to fall under the suspicion of lacking historical-mindedness, or of questioning the universal validity of the historical method. What one may assert without incurring the risk of such crushing imputations is, that the kind of constitutional history which consists in researches into the antiquities of English institutions, has no direct bearing on the rules of constitutional law in the sense in which these rules can become the subject of legal comment. Let us eagerly learn all that is known, and still more eagerly all that is not known, about the Witenagemót. But let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law was yesterday, still less what it was centuries ago, or what it ought to be to-morrow, but to state and explain what are the principles of law actually existing in England during the year of grace 1889, 52 & 53 Victoria. For this purpose it boots nothing to know the nature of the Landesgemeinden of Uri, or to understand, if it be understandable, the constitution of the Witenagemót. All this is for a lawyer's purposes simple antiquarianism. It throws as much light on the constitution of the United States as upon the constitution of England, that is, it throws from a legal point of view no light upon either the one or the other.

The name of the United States serves well to remind us of the true relation between constitutional

historians and legal constitutionalists. They are each concerned with the constitution, but from a different aspect. An historian is primarily occupied with ascertaining the steps by which a constitution has grown to be what it is. He is deeply, sometimes excessively, concerned with the question of "origins." He is but indirectly concerned in ascertaining what are the rules of the constitution in the year 1889. The lawyer, on the other hand, the primary object of [illegible] is the law as it now stands; he is only [illegible]arily occupied with ascertaining how it came [illegible]xistence. This is absolutely clear if we com[illegible]he position of an American historian with the [illegible]n of an American jurist. The historian of the [illegible]can Union would not commence his researches [illegible] year 1789; he would have a good deal to say [illegible] Colonial history and about the institutions of [illegible]nd; he might, for aught I know, find himself [illegible]ed to go back to the Witenagemót; he would, one may suspect, pause in his researches considerably short of Uri. A lawyer lecturing on the constitution of the United States would, on the other hand, necessarily start from the constitution itself. But he would soon see that the articles of the constitution required a knowledge of the Articles of Confederation; that the opinions of Washington, of Hamilton, and generally of the "Fathers," as one sometimes hears them called in America, threw light on the meaning of various constitutional articles; and further, that the meaning of the constitution could not be adequately understood by any one who did not take into account the situation of the colonies before the separation from England and the rules of common law, as well as the general con-

Contrast between legal and historical view of constitution.

ceptions of law and justice inherited by English colonists from their English forefathers. As it is with the American lawyer compared with the American historian, so it is with the English lawyer as compared with the English historian. Hence, even where lawyers are concerned, as they frequently must be, with the development of our institutions, arises a further difference between the historic and the legal view of the constitution. Historians in their devotion to the earliest phases of ascertainable histor infected with a love which, in the eyes of a l appears inordinate, for the germs of our institu and seem to care little about their later develop Mr. Freeman gives but one-third of his book t thing as modern as the days of the Stuarts period of nearly two centuries which has elapse what used to be called the "Glorious Revol filled as it is with change and with growth hardly to attract the attention of a writer whos not of knowledge, but of will alone prevents sketching out the annals of our modern constitution. A lawyer must look at the matter differently. It i from the later annals of England he derives most help in the study of existing law. What we might have got from Dr. Stubbs, had he not surrendered to the Episcopate gifts which we hoped were dedicated to the University alone, is now left to conjecture. But things being as they are, the historian who most nearly meets the wants of lawyers is Mr. Gardiner. The struggles of the seventeenth century, the conflict between James and Coke, Bacon's theory of the prerogative, Charles's effort to substitute the personal will of Charles Stuart for the legal will of the King of England, are all matters

which touch not remotely upon the problems of actual law. A knowledge of these things guards us, at any rate, from the illusion, for illusion it must be termed, that modern constitutional freedom has been established by an unbounding method of retrogressive progress; that every step towards civilisation has been a step backwards towards the simple wisdom of our unlettered ancestors. The assumption which underlies this view, namely, that there existed among our forefathers a more or less perfect polity, contains the truth both of law and of history. To ask [illegible] of legal subtleties "would have looked [illegible] eyes of a man who had borne his part [illegible]ons of Eadward and of Harold, and [illegible] raised his voice and clashed his arms in [illegible] Assembly which restored Godwine to his [illegible] to put an inquiry which involves an untenable assumption; it is like asking what a Cherokee [illegible] would have thought of the claim of George the third to separate taxation from representation. In each case the question implies that the simplicity of a savage enables him to solve with fairness a problem of which he cannot understand the terms. Civilisation may rise above, but barbarism sinks below the level of legal fictions, and our respectable Saxon ancestors were, as compared, not with ourselves only, but with men so like ourselves as Coke and Hale, respectable barbarians. The supposition, moreover, that the cunning of lawyers has by the invention of legal fictions corrupted the fair simplicity of our original constitution, underrates the statesmanship of lawyers as much as it overrates the merits of early society. The fictions of the Courts

[1] See Freeman, *Growth of the English Constitution* (1st ed.), p. 125.

have in the hands of lawyers such as Coke served the cause both of justice and of freedom, and served it when it could have been defended by other weapons. For there are social conditions under which legal fictions or subtleties afford the sole means of establishing that rule of equal and settled law which is the true basis of English civilisation. Nothing can be more pedantic, nothing more artificial, nothing more unhistorical, than the reasoning by which Coke induced or compelled James to forego the attempt to withdraw cases from the Courts for his Majesty's personal determination.[1] But no achievement of statesmanship, or stroke of enlightened statesmanship, ever established a rule more essential to the well-being of the constitution than the principle enforced by the obstinacy and the fallacies of the great Chief Justice. Oddly enough the notion of an ideal constitution corrupted by the technicalities of lawyers is at bottom a delusion of legal imagination. The idea of a retrogressive progress is merely one form of the appeal to precedent. This appeal has made its appearance at every crisis in the history of England, and indeed no one has stated so forcibly as my friend Mr. Freeman himself the peculiarity of all English efforts to extend the liberties of the country, namely, that these attempts at innovation have always assumed the form of an appeal to pre-existing rights. But the appeal to precedent is in the law courts merely a useful fiction by which judicial decision conceals its transformation into judicial legislation; and a fiction is none the less a fiction because it has emerged from the Courts into the field of politics or of history. Here, then, the astute-

[1] See 12 Rep. 64; Hearn, *Government of England* (2d ed.), chap. iii.

ness of lawyers has imposed upon the simplicity of historians. Formalism and antiquarianism have, so to speak, joined hands; they have united to mislead students in search for the law of the constitution.

Let us turn now to the political theorists.

III. View of political theorists. Its defect that it deals solely with conventions of constitution.

No better types of such thinkers can be taken than Bagehot and Professor Hearn. No author of modern times (it may be confidently asserted) has done so much to elucidate the intricate workings of English government as Bagehot. His *English Constitution* is so full of brightness, originality, and wit, that few students notice how full it is also of knowledge, of wisdom, and of insight. The slight touches, for example, by which Bagehot paints the reality of Cabinet government, are so amusing as to make a reader forget that Bagehot was the first author who explained in accordance with actual fact the true nature of the Cabinet and its real relation to the Crown and to Parliament. He is, in short, one of those rare teachers who have explained intricate matters with such complete clearness, as to make the public forget that what is now so clear ever needed explanation. Professor Hearn may perhaps be counted an anticipator of Bagehot. In any case he too has approached English institutions from a new point of view, and has looked at them in a fresh light; he would be universally recognised among us as one of the most distinguished and ingenious exponents of the mysteries of the English constitution, had it not been for the fact that he made his fame as a professor, not in any of the seats of learning in the United Kingdom, but in the University of Melbourne. From

both these writers we expect to learn, and do learn much, but as in the case of Mr. Freeman, though we learn much from our teacher which is of value, we do not learn precisely what as lawyers we are in search of. The truth is that both Bagehot and Professor Hearn deal and mean to deal mainly with political understandings or conventions and not with rules of law. What is the precise moral influence which might be exerted by a wise constitutional monarch; what are the circumstances under which a Minister is entitled to dissolve Parliament; whether the simultaneous creation of a large number of Peers for a special purpose is constitutionally justifiable; what is the principle on which a Cabinet may allow of open questions;—these and the like are the kind of inquiries raised and solved by writers whom, as being occupied with the conventional understandings of the constitution, we may term conventionalists. These inquiries are, many of them, great and weighty; but they are not inquiries which will ever be debated in the law courts. If the Premier should advise the creation of five hundred Peers, the Chancery Division would not, we may be sure, grant an injunction to restrain their creation. If he should on a vote of censure decline to resign office, the Queen's Bench Division would certainly not issue a *quo warranto* calling upon him to show cause why he continues to be Prime Minister. As a lawyer, I find these matters too high for me. Their practical solution must be left to the profound wisdom of Members of Parliament; their speculative solution belongs to the province of political theorists.

One suggestion, a mere legist may be allowed to

make, namely, that the authors who insist upon and explain the conventional character of the understandings which make up a great part of the constitution, leave unexplained the one matter which needs explanation. They give no satisfactory answer to the inquiry how it happens that the understandings of politics are sometimes at least obeyed as rigorously as the commands of law.[1] To refer to public opinion and to considerations of expediency is to offer but a very inadequate solution of a really curious problem. Public opinion approves and public expediency requires the observance of contracts, yet contracts are not always observed, and would (presumably) be broken more often than they are did not the law punish their breach, or compel their performance. Meanwhile it is certain that understandings are not laws, and that no system of conventionalism will explain the whole nature of constitutional law, if indeed "constitutional law" be in strictness law at all.

And conventional view does not explain how conventions enforced.

For at this point a doubt occurs to one's mind which must more than once have haunted students of the constitution. Is it possible that so-called "constitutional law" is in reality a cross between history and custom which does not properly deserve the name of law at all, and certainly does not belong to the province of a professor called upon to learn or to teach nothing but the true indubitable law of England? Can it be that a dark saying of De Tocqueville's, "the English constitution has no real existence" (*elle n'existe point*[2]), contains the truth of

Is constitutional law really "law" at all?

[1] See further on this point, Part III. *post.*

[2] De Tocqueville, *Œuvres Complètes*, i. 166, 167.

the whole matter? In this case lawyers would gladly surrender a domain to which they can establish no valid title. The one half of it should, as belonging to history, go over to our historical professors; on this transfer of territory being carried out, we might perhaps suggest to our friends the professors of history, the advisability of conferring together and carefully reconsidering the doctrine that the constitution was "finally completed" in the reign of Edward the First; it is at least worth argument whether, when the foundations of a house are just laid, the house can or cannot be said to be finally completed. The other half should, as belonging to conventions which illustrate the growth of law, be transferred either to my friend the Professor of Jurisprudence, because it is his vocation to deal with the oddities or the outlying portions of legal science, or to my friend the Professor of International Law, because he being a teacher of law which is not law, and being accustomed to expound those rules of public ethics which are miscalled international law, will find himself at home in expounding political ethics which, on the hypothesis under consideration, are miscalled constitutional law.

Before, however, admitting the truth of the supposition that "constitutional law" is in no sense law at all, it will be well to examine a little further into the precise meaning which we attach to the term constitutional law, and then consider how far it is a fit subject for legal exposition.

It consists of two different kinds of rules.

Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign

power in the state.[1] Hence it includes (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority. Its rules prescribe the order of succession to the throne, regulate the prerogatives of the chief magistrate, determine the form of the legislature and its mode of election. These rules also deal with Ministers, with their responsibility, with their spheres of action, define the territory over which the sovereignty of the state extends and settle who are to be deemed subjects or citizens. Observe the use of the word "rules," not "laws." This employment of terms is intentional. Its object is to call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.

(i.) Rules which are true laws —law of the constitution.

The one set of rules are in the strictest sense "laws," since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the Common Law) are enforced by the Courts; these rules constitute "constitutional law" in the proper sense of that term, and may for the sake of distinction be called collectively, "the law of the constitution."

[1] Compare Holland, *Jurisprudence* (4th ed.), pp. 122 and 303-307. "By the constitution of a country is meant so much of its law as "relates to the designation and form of the legislature; the rights and "functions of the several parts of the legislative body; the construction, "office, and jurisdiction of courts of justice. The constitution is one "principal division, section, or title of the code of public laws, dis-"tinguished from the rest only by the superior importance of the sub-"ject of which it treats."—Paley, *Moral Philosophy*, Book vi. chap. vii.

(ii.) Rules which are not laws—conventions of the constitution.

The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution," or constitutional morality.

To put the same thing in a somewhat different shape, "constitutional law," as the expression is used in England, both by the public and by authoritative writers, consists of two elements. The one element, here called the "law of the constitution," is a body of undoubted law; the other element, here called the "conventions of the constitution," consists of maxims or practices which, though they regulate the ordinary conduct of the Crown and of Ministers and of others under the constitution, are not in strictness laws at all. The contrast between the law of the constitution and the conventions of the constitution may be most easily seen from examples.

Examples of rules belonging to law of constitution.

To the law of the constitution belong the following rules:—

(1) "The King can do no wrong." This maxim, as now interpreted by the Courts, means, in the first place, that by no proceeding known to the law can the King be made personally responsible for any act done by him; if (to give an absurd example) the Queen were herself to shoot the Premier through the head, no Court in England could take cognisance of the act. The maxim means, in the second place, that no one can plead the orders of the Crown or indeed of any superior officer in defence of any act not other-

wise justifiable by law; this principle in both its applications is (be it noted) a law and a law of the constitution, but it is not a written law. "There is no power in the Crown to dispense with the obligation to obey a law;" this negation or abolition of the dispensing power now depends upon the Bill of Rights; it is a law of the constitution and a written law. "Some person is legally responsible for every act done by the Crown." This responsibility of Ministers appears in foreign countries as a formal part of the constitution; in England it results from the combined action of several legal principles, namely, first, the maxim that the King can do no wrong; secondly, the refusal of the Courts to recognise any act as done by the Crown, which is not done in a particular form, a form in general involving the affixing of a particular seal by a Minister, or the counter-signature or something equivalent to the counter-signature of a Minister; thirdly, the principle that the Minister who affixes a particular seal, or countersigns his signature, is responsible for the act which he, so to speak, endorses;[1] this again is part of the constitution and a law, but it is not a written law. So again the right to personal liberty, the right of public meeting, and many other rights, are part of the law of the constitution, though most of these rights are consequences of the more general law or principle that no man can be punished except for direct breaches of law (*i.e.* crimes) proved in the way provided by law (*i.e.* before the Courts of the realm).

To the conventions of the constitution belong the following maxims:—

[1] Compare Hearn, *Government of England* (2d ed.), chap. iv.

Examples of rules which belong to conventions of the constitution.

"The King must assent to, or (as it is inaccurately expressed) cannot 'veto'[1] any bill passed by the two Houses of Parliament;"—"the House of Lords does not originate any money bill;"—"when the House of Lords acts as a Court of Appeal, no peer who is not a law lord takes part in the decisions of the House;"—"Ministers resign office when they have ceased to command the confidence of the House of Commons;"—"a bill must be read a certain number of times before passing through the House of Commons." These maxims are distinguished from each other by many differences;[2] under a new or written constitu-

[1] As to the meaning of "veto," see Hearn, *Government of England* (2d ed.), pp. 51, 60, 61, 63, 548, and the article on the word Veto in the last edition of the *Encyclopædia Britannica*, by Professor Orelli.

[2] Some of these maxims are never violated, and are universally admitted to be inviolable. Others, on the other hand, have nothing but a slight amount of custom in their favour, and are of disputable validity. The main distinction between different classes of conventional rules may, it is conceived, be thus stated: Some of these rules could not be violated without bringing to a stop the course of orderly and pacific government; others might be violated without any other consequence than that of exposing the Minister or other person by whom they were broken to blame or unpopularity.

This difference will at bottom be found to depend upon the degree of directness with which the violation of a given constitutional maxim brings the wrongdoer into conflict with the law of the land. Thus a Ministry under whose advice Parliament were not summoned to meet for more than a year would, owing to the lapse of the Mutiny Act, etc., become through their agents engaged in a conflict with the Courts. The violation of a convention of the constitution would in this case lead to revolutionary or reactionary violence. The rule, on the other hand, that a bill must be read a given number of times before it is passed is, though a well-established constitutional principle, a convention which might be disregarded without bringing the Government into conflict with the ordinary law. A Ministry who induced the House of Commons to pass an Act, *e.g.* suspending the Habeas Corpus Act, after one reading, or who induced the House to alter their rules as to the number of times a Bill should be read, would in no way be exposed to a contest with the ordinary tribunals. Ministers who, after Supplies were voted and the Mutiny Act passed, should prorogue the House and keep office for months after the Government had ceased to

tion some of them probably would and some of them would not take the form of actual laws. Under the English constitution they have one point in common: they are none of them "laws" in the true sense of that word, for if any or all of them were broken, no court would take notice of their violation.

It is to be regretted that these maxims must be called "conventional," for the word suggests a notion of insignificance or unreality. This, however, is the last idea which any teacher would wish to convey to his hearers. Of constitutional conventions or practices some are as important as any laws, though some may be trivial, as may also be the case with a genuine law. My object, however, is to contrast, not shams with realities, but the legal element with the conventional element of so-called "constitutional law."

Distinction between laws and conventions not the same as difference between written and unwritten law.

This distinction differs essentially, it should be noted, from the distinction between "written law" (or statute law) and "unwritten law" (or common law). There are laws of the constitution, as the Bill of Rights, the Act of Settlement, the Habeas Corpus Acts, which are "written law," found in the statute-book—in other words, statutory enactments. There are other most important laws of the constitution (several of which have already been mentioned) which are "unwritten" laws, that is, not statutory enactments. Some further of the laws of the constitution, such, for example, as the law regulating the descent of the Crown, which were at one time

retain the confidence of the Commons, might or might not incur grave unpopularity, but would not necessarily commit a breach of law. See further Part III. *post*.

unwritten or common law, have now become written or statute law. The conventions of the constitution, on the other hand, cannot be recorded in the statute-book, though they may be formally reduced to writing. Thus the whole of our parliamentary procedure is nothing but a mass of conventional law; it is, however, recorded in written or printed rules. The distinction, in short, between written and unwritten law does not in any sense square with the distinction between the law of the constitution (constitutional law properly so called) and the conventions of the constitution. This latter is the distinction on which we should fix our whole attention, for it is of vital importance, and elucidates the whole subject of constitutional law. It is further a difference which may exist in countries which have a written or statutory constitution.[1] In the United States the legal powers of the President, the Senate, the mode of electing the President, and the like, are, as far as the law is concerned, regulated wholly by the law of the constitution. But side by side with the law have grown up certain stringent conventional rules, which, though they would not be noticed by any Court, have in practice nearly the force of law. No President has ever been re-elected more than once: the popular approval of this conventional limit (of which

[1] The conventional element in the constitution of the United States is far larger than most Englishmen suppose. See on this subject Wilson, *Congressional Government*, and Bryce, *American Commonwealth*, chaps. xxxiv. and xxxv. It may be asserted without much exaggeration that the conventional element in the Constitution of the United States is now as large as in the English constitution. Under the American system, however, the line between "conventional rules" and "laws" is drawn with a precision hardly possible in England.

the constitution knows nothing) on a President's re-eligibility proved a fatal bar to General Grant's third candidature. Constitutional understandings have entirely changed the position of the Presidential electors. They were by the founders of the constitution intended to be what their name denotes, the persons who chose or selected the President; the chief officer, in short, of the Republic was, according to the law, to be appointed under a system of double election. This intention has failed; the "electors" have become a mere means of voting for a particular candidate; they are no more than so many ballots cast for the Republican or the Democratic nominee. The understanding that an elector is not really to elect, has now become so firmly established, that for him to exercise his legal power of choice is considered a breach of political honour too gross to be committed by the most unscrupulous of politicians. Public difficulties, not to say dangers, might have been averted if, in the contest between Mr. Hayes and Mr. Tilden, a few Republican electors had felt themselves at liberty to vote for the Democratic candidate. Not a single man among them changed his side. The power of an elector to elect is as completely abolished by constitutional understandings in America as is the royal right of dissent from bills passed by both Houses by the same force in England. Under a written, therefore, as under an unwritten constitution, we find in full existence the distinction between the law and the conventions of the constitution.

Upon this difference I have insisted at possibly needless length, because it lies at the very root of the matter under discussion. Once grasp the ambiguity

Constitutional law as subject of legal study means solely law of constitution.

latent in the expression "constitutional law," and everything connected with the subject falls so completely into its right place that a lawyer, called upon to teach or to study constitutional law as a branch of the law of England, can hardly fail to see clearly the character and scope of his subject.

With conventions or understandings he has no direct concern. They vary from generation to generation, almost from year to year. Whether a Ministry defeated at the polling booths ought to retire on the day when the result of the election is known, or may more properly retain office until after a defeat in Parliament, is or may be a question of practical importance. The opinions on this point which prevail to-day differ (it is said) from the opinions or understandings which prevailed thirty years back, and are possibly different from the opinions or understandings which may prevail ten years hence. Weighty precedents and high authority are cited on either side of this knotty question; the dicta or practice of Russell and Peel may be balanced off against the dicta or practice of Beaconsfield and Gladstone. The subject, however, is one not of law but of politics, and need trouble no lawyer or the class of any professor of law. If he is concerned with it at all he is so only in so far as he may be called upon to show what is the connection (if any there be) between the conventions of the constitution and the law of the constitution.

This the true constitutional law is his only real concern. His proper function is to show what are the legal rules (*i.e.* rules recognised by the Courts) which are to be found in the several parts of the constitution. Of such rules or laws he will easily discover more than

enough. The rules determining the legal position of the Crown, the legal rights of the Crown's ministers, the constitution of the House of Lords, the constitution of the House of Commons, the laws which govern the established Church, the laws which determine the position of the non-established Churches, the laws which regulate the army,—these and a hundred other laws form part of the law of the constitution, and are as truly part of the law of the land as the articles of the Constitution of the United States form part of the law of the Union.

Law of constitution can be expounded like any other branch of English law.

The duty, in short, of an English Professor of law is to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection. He ought to expound the unwritten or partly unwritten constitution of England, in the same manner in which Story and Kent have expounded the written law of the American constitution. The task has its special perplexities, but the difficulties which beset the topic are the same in kind, though not in degree, as those which are to be found in every branch of the law of England. You have to deal partly with statute law, partly with judge-made law; you have to rely on Parliamentary enactments and also on judicial decisions, on authoritative dicta, and in many cases on mere inferences drawn from judicial doctrines; it is difficult to discriminate between prevalent custom and acknowledged law. This is true of the endeavour to expound the law of the constitution; all this is true also in a measure of any attempt to explain our law of contract, our law of torts, or our law of real property.

Moreover, teachers of constitutional law enjoy at this moment one invaluable advantage. Their topic has from the circumstances of the time become of immediate interest and of pressing importance. Each year that passes brings into the foreground new constitutional questions, and affords in many instances the answers thereto. The series of actions connected with the name of Mr. Bradlaugh has done as much to clear away the obscurity which envelops many parts of our public law as was done in the last century by the series of actions connected with the name of John Wilkes. The law of maintenance has been rediscovered; the law of blasphemy has received new elucidation. All the world now know the character of a penal action. It is now possible to define with precision the relation between the House of Commons and the Courts of the land; the legal character and solemnity of an oath has been made patent to all the world, or at any rate to all that portion of it who choose to read the *Law Reports*. Meanwhile circumstances with which Mr. Bradlaugh has no connection have forced upon public attention all the various problems connected with the right of public meeting. Is such a right known to the law? What are the limits within which it may be exercised? What is the true definition of an "unlawful assembly"? How far may citizens lawfully assembled assert their right of meeting by the use of force? What are the limits within which the English Constitution recognises the right of self-defence? These are questions some of which have been raised and all of which may any day be raised before the Courts. They are inquiries which touch the very root of our public law. To find the

true reply to them is a matter of importance to every citizen. While these inquiries require an answer the study of the law of the constitution must remain a matter of pressing interest. The fact, however, that the provisions of this law are often embodied in cases of notoriety and which excite keen feelings of political partisanship may foster a serious misconception. Unintelligent students may infer that the law of the constitution is to be gathered only from notorious judgments which embalm the results of grand constitutional or political conflicts. This is not so. Scores of unnoticed cases, such as the *Parlement Belge*,[1] or *Thomas* v. *The Queen*,[2] touch upon or decide principles of constitutional law. Indeed every action against a constable or collector of revenue enforces the greatest of all such principles, namely, that obedience to administrative orders is no defence to an action or prosecution for acts done in excess of legal authority. The true law of the constitution is in short to be gathered from the same sources whence we collect the law of England in respect to any other topic, and forms as interesting and as distinct, though not as well explored, a field for legal study or legal exposition as any which can be found. The subject is one which has not yet been fully mapped out. Teachers and pupils alike therefore suffer from the inconvenience as they enjoy the interest of exploring a province of law which has not yet been reduced to order.

This inconvenience has one great compensation. We are compelled to search for the guidance of first principles, and as we look for a clue through the mazes of a perplexed topic, three such guiding prin-

[1] 4 P. D. 129; 5 P. D. 197. [2] L. R., 10 Q. B. 31.

ciples gradually become apparent. They are, *first*, the legislative sovereignty of Parliament;[1] *secondly*, the universal rule or supremacy throughout the constitution of ordinary law;[2] and *thirdly* (though here we tread on more doubtful and speculative ground), the dependence in the last resort of the conventions upon the law of the constitution.[3] To examine, to elucidate, to test these three principles forms, at any rate (whatever be the result of the investigation), a suitable introduction to the study of the law of the constitution.

[1] See Part I. [2] See Part II. [3] See Part III.

PART I

THE SOVEREIGNTY OF PARLIAMENT

CHAPTER I

THE NATURE OF PARLIAMENTARY SOVEREIGNTY

THE sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions.

Aim of chapter.

My aim in this chapter is, in the first place, to explain the nature of Parliamentary sovereignty and to show that its existence is a legal fact, fully recognised by the law of England; in the next place, to prove that none of the alleged legal limitations on the sovereignty of Parliament have any existence; and, lastly, to state and meet certain speculative difficulties which hinder the ready admission of the doctrine that Parliament is, under the British constitution, an absolutely sovereign legislature.

Nature of Parliamentary Sovereignty.

A. *Nature of Parliamentary Sovereignty.*—Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the "King in Parliament," and constitute Parliament.[1]

[1] Conf. Blackstone, *Commentaries*, i. p. 153.

Part I.

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

A law may, for our present purpose, be defined as "any rule which will be enforced by the Courts." The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament. Some apparent exceptions to this rule no doubt suggest themselves. But these apparent exceptions, as where, for example, the Judges of the High Court of Justice make rules of court repealing Parliamentary enactments, are resolvable into cases in which Parliament either directly or indirectly sanctions subordinate legislation. This is not the place for entering into any details as to the nature of judicial legislation;[1] the matter is mentioned here only in order to remove an obvious

[1] The reader who wishes for fuller information on the nature of judge-made law will find what he wants in Professor Pollock's *Essays in Jurisprudence and Ethics*, p. 237.

difficulty which might present itself to some students. It will be necessary in the course of these lectures to say a good deal more about Parliamentary sovereignty, but for the present the above rough description of its nature may suffice. The important thing is to make clear that the doctrine of Parliamentary sovereignty is, both on its positive and on its negative side, fully recognised by the law of England.

Unlimited legislative authority of Parliament.

I. *Unlimited legislative authority of Parliament.*—The classical passage on this subject is the following extract from Blackstone's *Commentaries*:—

"The power and jurisdiction of Parliament, says "Sir Edward Coke,[1] is so transcendent and absolute, "that it cannot be confined, either for causes or per- "sons, within any bounds. And of this high court, he "adds, it may be truly said, '*Si antiquitatem spectes, "est vetustissima; si dignitatem, est honoratissima; si "jurisdictionem, est capacissima.*' It hath sovereign "and uncontrollable authority in the making, confirm- "ing, enlarging, restraining, abrogating, repealing, re- "viving, and expounding of laws, concerning matters "of all possible denominations, ecclesiastical or tem- "poral, civil, military, maritime, or criminal: this "being the place where that absolute despotic power, "which must in all governments reside somewhere, is "entrusted by the constitution of these kingdoms. All "mischiefs and grievances, operations and remedies, "that transcend the ordinary course of the laws, are "within the reach of this extraordinary tribunal. It "can regulate or new-model the succession to the "crown; as was done in the reign of Henry VIII. and

[1] *Fourth Institute*, p. 36.

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"William III. It can alter the established religion "of the land; as was done in a variety of instances, "in the reigns of king Henry VIII. and his three "children. It can change and create afresh even the "constitution of the kingdom and of parliaments them- "selves; as was done by the act of union, and the "several statutes for triennial and septennial elections. "It can, in short, do everything that is not naturally "impossible; and therefore some have not scrupled to "call it's power, by a figure rather too bold, the "omnipotence of Parliament. True it is, that what the "Parliament doth, no authority upon earth can undo. "So that it is a matter most essential to the liberties of "this kingdom, that such members be delegated to this "important trust, as are most eminent for their probity, "their fortitude, and their knowledge; for it was a "known apophthegm of the great lord treasurer Bur- "leigh, 'that England could never be ruined but by "a Parliament:' and, as Sir Matthew Hale observes, "this being the highest and greatest court, over which "none other can have jurisdiction in the kingdom, if "by any means a misgovernment should any way fall "upon it, the subjects of this kingdom are left without "all manner of remedy. To the same purpose the "president Montesquieu, though I trust too hastily, "presages; that as Rome, Sparta, and Carthage have "lost their liberty and perished, so the constitution of "England will in time lose it's liberty, will perish: "it will perish whenever the legislative power shall "become more corrupt than the executive."[1]

De Lolme has summed up the matter in a grotesque expression which has become almost proverbial.

[1] Blackstone, *Commentaries*, i. pp. 160, 161.

"It is a fundamental principle with English lawyers, "that Parliament can do everything but make a "woman a man, and a man a woman."

Historical examples of Parliamentary sovereignty.

This supreme legislative authority of Parliament is shown historically in a large number of instances. The descent of the Crown was varied and finally fixed under the Act of Settlement, 12 & 13 William III., c. 2; the Queen occupies the throne under a Parliamentary title; her claim to reign depends upon and is the result of a statute. This is a proposition which, at the present day, no one is inclined either to maintain or to dispute; but a glance at the statute-book shows that not two hundred years ago Parliament had to insist strenuously upon the principle of its own lawful supremacy. The first section of 6 Anne, c. 7, enacts (*inter alia*), "That if any person or "persons shall maliciously, advisedly, and directly by "writing or printing maintain and affirm that our "sovereign lady the Queen that now is, is not the "lawful and rightful Queen of these realms, or that the "pretended Prince of Wales, who now styles himself "King of Great Britain, or King of England, by the "name of James the Third, or King of Scotland, by the "name of James the Eighth, hath any right or title to "the Crown of these realms, or that any other person "or persons hath or have any right or title to the same, "otherwise than according to an Act of Parliament "made in England in the first year of the reign of their "late Majesties King William and Queen Mary, of "ever blessed and glorious memory, intituled, An Act "declaring the rights and liberties of the subject, and "settling the succession of the Crown; and one other "Act made in England in the twelfth year of the reign

Act of Settlement.

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" of his said late Majesty King William the Third, " intituled, An Act for the further limitation of the " Crown, and better securing the rights and liberties of " the subject; and the Acts lately made in England " and Scotland mutually for the union of the two " kingdoms; or that the Kings or Queens of this realm, " with and by the authority of Parliament, are not able " to make laws and statutes of sufficient force and " validity to limit and bind the Crown, and the descent, " limitation, inheritance, and government thereof; " every such person or persons shall be guilty of high " treason, and being thereof lawfully convicted, shall be " adjudged traitors, and shall suffer pains of death, and " all losses and forfeitures as in cases of high treason."[1]

Acts of Union.

The Acts of Union (to one of which Blackstone calls attention) afford a remarkable example of the exertion of Parliamentary authority. But there is no single statute which is more significant either as to the theory or as to the practical working of the constitution than the Septennial Act.[2] The circumstances of its enactment and the nature of the Act itself merit therefore special attention.

Septennial Act.

In 1716 the duration of Parliament was under an Act of 1694 limited to three years, and a general election could not be deferred beyond 1717. The King and the Ministry were convinced (and with reason) that an appeal to the electors, many of whom were Jacobites, might be perilous not only to the Ministry but to the tranquillity of the state. The Parliament then sitting, therefore, was induced by the Ministry to pass the Septennial Act by which the legal duration of Parliament was extended from three

[1] 6 Anne, c. 7, sec. 1. [2] 1 George I. st. 2, c. 38.

to seven years, and the powers of the then existing House of Commons were in effect prolonged for four years beyond the time for which the House was elected. This was a much stronger proceeding than passing say an Act which enabled future Parliaments to continue in existence without the necessity for a general election during seven instead of during three years. The statute was justified by considerations of statesmanship and expediency. This justification of the Septennial Act must seem to every sensible man so ample that it is with some surprise that one reads in writers so fair and judicious as Hallam or Lord Stanhope attempts to minimise the importance of this supreme display of legislative authority. "Nothing," writes Hallam, "can be more extravagant "than what is sometimes confidently pretended by the "ignorant, that the legislature exceeded its rights by "this enactment; or, if that cannot legally be ad-"vanced, that it at least violated the trust of the "people, and broke in upon the ancient constitution;" and this remark he bases on the ground that "the "law for triennial Parliaments was of little more than "twenty years' continuance. It was an experiment, "which, as was argued, had proved unsuccessful; it "was subject, like every other law, to be repealed "entirely, or to be modified at discretion."[1]

"We may," says Lord Stanhope, ". . . cast aside "the foolish idea that the Parliament overstepped its "legitimate authority in prolonging its existence; an "idea which was indeed urged by party-spirit at the "time, and which may still sometimes pass current in "harangues to heated multitudes, but which has been

[1] Hallam, *Constitutional History of England*, iii. (1872 ed.), p. 236.

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"treated with utter contempt by the best constitu-
"tional writers."[1]

Constitutional importance of Septennial Act.

These remarks miss the real point of the attack on the Septennial Act and also conceal the constitutional importance of the statute. The thirty-one Peers who protested against the Bill because (among other grounds) "it is agreed, that the House of Commons "must be chosen by the people, and when so chosen, "they are truly the representatives of the people, "which they cannot be so properly said to be, when "continued for a longer time than that for which they "were chosen; for after that time they are chosen by "the Parliament, and not the people, who are thereby "deprived of the only remedy which they have against "those, who either do not understand, or through cor-"ruption, do wilfully betray the trust reposed in them; "which remedy is, to choose better men in their "places,"[2] hit exactly the theoretical objection to it. The peculiarity of the Act was not that it changed the legal duration of Parliament or repealed the Triennial Act;[3] the mere passing of a Septennial Act in 1716 was not and would never have been thought to be anything more startling or open to graver censure than the passing of a Triennial Act in 1694. What was startling was that an existing Parliament of its own authority prolonged its own legal existence. Nor can the argument used by Priestley,[4] and in effect by the protesting Peers, "that Septennial Parliaments "were at first a direct usurpation of the rights of the "people; for by the same authority that one Parlia-

[1] Lord Mahon, *History of England*, i. p. 302.
[2] Thorold Rogers, *Protests of the Lords*, i. p. 228.
[3] 6 Wm. and M. c. 2.
[4] See *Priestley on Government* (1771), p. 20.

ment prolonged their own power to seven years, they "might have continued it to twice seven, or like the 'Parliament of 1641 have made it perpetual," be treated as a blunder grounded simply on the "ignorant assumption" that the Septennial Act prolonged the original duration of Parliament.[1] The contention of Priestley and others was in substance that members elected to serve for three years were constitutionally so far at least the delegates or agents of their constituents that they could not without an inroad on the constitution extend their own authority beyond the period for which it was conferred upon them by their principals, *i.e.* the electors. There are countries, and notably the United States, where an Act like the Septennial Act would be held legally invalid; no modern English Parliament would for the sake of keeping a government or party in office venture to pass say a Decennial Act and thus prolong its own duration; the contention therefore that Walpole and his followers in passing the Septennial Act violated the understandings of the constitution has on the face of it nothing absurd. Parliament made a legal though unprecedented use of its powers. To underrate this exertion of authority is to deprive the Septennial Act of its true constitutional importance. That Act proves to demonstration that in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state and the Septennial Act is at once the result and the standing proof of such Parliamentary sovereignty.

Hitherto we have looked at Parliament as legally

[1] Hallam, *Constitutional History*, iii. p. 236 (n.)

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Interference of Parliament with private rights.

omnipotent in regard to public rights. Let us now consider the position of Parliament in regard to those private rights which are in civilised states justly held specially secure or sacred. Coke (it should be noted) particularly chooses interference with private rights as specimens of Parliamentary authority.

"Yet some examples are desired. Daughters and "heirs apparent of a man or woman, may by Act of "Parliament inherit during the life of the ancestor.

"It may adjudge an infant, or minor of full age.

"To attaint a man of treason after his death.

"To naturalise a mere alien, and make him a sub-"ject born. It may bastard a child that by law is "legitimate, viz. begotten by an adulterer. the hus-"band being within the four seas.

"To legitimate one that is illegitimate, and born "before marriage absolutely. And to legitimate 'secundum quid, but not *simpliciter*."[1]

Coke is judicious in his choice of instances. Interference with public rights is at bottom a less striking exhibition of absolute power than is the interference with the far more important rights of individuals; a ruler who might think nothing of overthrowing the constitution of his country, would in all probability hesitate a long time before he touched the property or interfered with the contracts of private persons. Parliament however habitually interferes, for the public advantage, with private rights. Indeed such interference has now (greatly to the benefit of the community) become so much a matter of course as hardly to excite remark, and few persons reflect what a sign this interference is of the

[1] Coke, *Fourth Institute*, p. 36.

supremacy of Parliament. The statute-book teems with Acts under which Parliament gives privileges or rights to particular persons or imposes particular duties or liabilities upon other persons. This is of course the case with every railway Act, but no one will realise the full action, generally the very beneficial action of Parliamentary sovereignty, who does not look through a volume or two of what are called *Local and Private Acts*. These Acts are just as much Acts of Parliament as any Statute of the Realm. They deal with every kind of topic, as with railways, harbours, docks, the settlement of private estates and the like. To these you should add Acts such as those which declare valid marriages which, owing to some mistake of form or otherwise, have not been properly celebrated, and Acts, common enough at one time but now rarely passed, for the divorce of married persons.

One further class of statutes deserve in this connection more notice than they have received—these are Acts of Indemnity.

Acts of Indemnity.

An Act of Indemnity is a statute, the object of which is to make legal transactions which when they took place were illegal, or to free individuals to whom the statute applies from liability for having broken the law; enactments of this kind were annually passed with almost unbroken regularity for more than a century (1727-1828) to free Dissenters from penalties, for having accepted municipal offices without duly qualifying themselves by taking the sacrament according to the rites of the Church of England. To the subject of Acts of Indemnity however we shall return in a later chapter.[1] The point to be now

[1] See chap. v. *post*.

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noted is that such enactments being as it were the legislation of illegality are the highest exertion and crowning proof of sovereign power.

So far of the sovereignty of Parliament from its positive side: let us now look at the same doctrine from its negative aspect.

No other competing legislative authority.

II. *The absence of any competing legislative power.*—The King, each House of Parliament, the Constituencies, and the Law Courts, either have at one time claimed, or might appear to claim, independent legislative power. It will be found however on examination that the claim can in none of these cases be made good.

The King.

(i.) *The King.*—Legislative authority originally resided in the King in Council,[1] and even after the commencement of Parliamentary legislation there existed side by side with it a system of royal legislation under the form of Ordinances,[2] and (at a later period) of Proclamations.

Statute of Proclamations.

These had much the force of law, and in the year 1539 the Act 31 Henry VIII., c. 8, formally empowered the Crown to legislate by means of proclamations. This statute is so short and so noteworthy that it may well be quoted *in extenso*. "The King," it runs, "for "the time being, with the advice of his Council, or the "more part of them, may set forth proclamations under "such penalties and pains as to him and them shall "seem necessary, which shall be observed as though

[1] See Stubbs, *Constitutional History*, i. pp. 126-128, and ii. pp. 245-247.

[2] Stubbs, *ibid.* ii. chap. xv.

" they were made by Act of Parliament; but this shall " not be prejudicial to any person's inheritance, offices, " liberties, goods, chattels or life; and whosoever shall " willingly offend any article contained in the said pro- " clamations, shall pay such forfeitures, or be so long " imprisoned, as shall be expressed in the said pro- " clamations; and if any offending will depart the " realm, to the intent he will not answer his said " offence, he shall be adjudged a traitor."[1]

This enactment marks the highest point of legal authority ever reached by the Crown, and, probably because of its inconsistency with the whole tenor of English law, was repealed in the reign of Edward the Sixth. It is curious to notice how revolutionary would have been the results of the statute had it remained in force. It must have been followed by two consequences. An English king would have become nearly as despotic as a French monarch. The statute would further have established a distinction between "laws" properly so-called as being made by the legislature and "ordinances" having the force of law, though not in strictness laws as being rather decrees of the executive power than Acts of the legislature. This distinction exists in one form or another in most continental states, and is not without great practical utility. In foreign countries the legislature generally confines itself to laying down general principles of legislation, and leaves them with great advantage to the public to be supplemented by decrees or regulations which are the work of the executive. The cumbersomeness and prolixity of English statute law is due in no small measure to futile endeavours of

[1] 31 Henry VIII., cap. 8.

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Parliament to work out the details of large legislative changes. This evil has become so apparent that in modern times Acts of Parliament constantly contain provisions empowering the Privy Council, the judges, or some other body to make rules under the Act for the determination of details which cannot be settled by Parliament. But this is only an awkward mitigation[1] of an acknowledged evil, and the substance no less than the form of the law would, it is probable, be a good deal improved if the executive government of England could like that of France, by means of decrees, ordinances, or proclamations having the force of law, work out the detailed application of the general principles embodied in the Acts of the legislature.[2] In this, as in some other instances, restrictions wisely placed by our forefathers on the growth of royal power, are at the present day the cause of unnecessary restraints on the action of the executive government. For the repeal of 31 Henry VIII., c. 8, rendered

[1] A critic has objected to the words "awkward mitigation of an acknowledged evil" on the ground that they condemn in England a system which as it exists abroad is referred to as being not without great practical utility. The expression objected to is, however, justifiable. Under the English system elaborate and detailed statutes are passed, and the power to make rules under the statute, *e.g.* by order in council or otherwise, is introduced only in cases where it is obvious that to embody the rules in the statute is either highly inexpedient or practically impossible. Under the foreign, and especially the French system, the form of laws, or in other words, of statutes, is permanently affected by the knowledge of legislators and draftsmen that any law will be supplemented by decrees. English statutes attempt, and with very little success, to provide for the detailed execution of the laws enacted therein. Foreign laws are, what every law ought to be, statements of general principles.

[2] Recent events, as for example the issue by the French Government of the decree secularising the Pantheon, have called attention to the considerable though subordinate legislative authority possessed by the President of the French Republic. See on the subject of these legislative powers, M. F. Bœuf, *Droit Administratif* (4me ed.), p. 11.

governmental legislation, with all its defects and merits, impossible, and left to proclamations only such weight as they might possess at common law. The exact extent of this authority was indeed for some time doubtful. In 1610, however, a solemn opinion or protest of the judges[1] established the modern doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law, but they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament. In 1766 Lord Chatham attempted to prohibit by force of proclamation the exportation of wheat, and the Act of Indemnity (7 George III., c. 7), passed in consequence of this attempt, may be considered the final legislative disposal of any claim on the part of the Crown to make law by force of proclamation.

The main instances[2] where, in modern times, proclamations or orders in council are of any effect are cases either where, at common law, a proclamation is the regular mode, not of legislation, but of announcing

[1] See Coke, *Rep.* xii. p. 74; and Gardiner, *History of England*, ii. pp. 104, 105.

[2] In rare instances, which are survivals from the time when the King of England was the true "sovereign" in the technical sense of that term, the Crown exercises legislative functions in virtue of the prerogative. Thus the Crown can legislate, by proclamations or orders in council, for a newly conquered country (*Campbell* v. *Hall*, Cowp. 204), and has claimed the right, though the validity thereof is doubtful, to legislate for the Channel Islands by orders in council. *In the Matter of the States of Jersey*, 9 Moore P. C., n. s. 184, 262. See Stephen, *Commentaries* (8th ed.), i. pp. 100-102. Acts of Parliament further applying to the Channel Islands are, I am told, as a matter of custom extended to the Islands by order in council. There is, however, of course no doubt that an Act of Parliament can in any case override the effect of an order in council, and that such an Act is *proprio vigore* of effect in any part of the British dominions to which it extends.

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the executive will of the King, as when parliament is summoned by proclamation, or else where orders in council have authority given to them by Act of Parliament.

Houses of Parliament.

(ii.) *Resolutions of either House of Parliament.*—The House of Commons at any rate, has from time to time appeared to claim for resolutions of the House, something like legal authority. That this pretension cannot be supported is certain, but there exists some difficulty in defining with precision the exact effect which the Courts concede to a resolution of either House.

Two points are, however, well established.

Resolutions of either House.

First. The resolution of neither House is a law. This is the substantial result of the case of *Stockdale* v. *Hansard*.[1] The gist of the decision in the case is that a libellous document did not cease to be a libel because it was published by the order of the House of Commons, or because the House subsequently resolved that the power of publishing the report which contained it, was an essential incident to the constitutional functions of Parliament.

Secondly. Each House of Parliament has complete control over its own proceedings, and also has the right to protect itself by committing for contempt any person who commits any injury against, or offers any affront to the House, and no Court of law will inquire into the mode in which either House exercises the powers which it by law possesses.[2]

The practical difficulty lies in the reconciliation of

[1] 9 A. & E. 1.

[2] See *Stockdale* v. *Hansard*, 9 A. & E. 1; *Case of Sheriff of Middlesex*, 11 A. & E. 273; *Burdett* v. *Abbot*, 14 East, 1, 111, 131; *Bradlaugh* v. *Gossett*, 12 Q. B. D. 272.

the first with the second proposition, and is best met by following out the analogy suggested by Mr. Justice Stephen, between a resolution of the House of Commons, and the decision of a Court from which there is no appeal

"I do not say," runs his judgment, "that the resolution of the House is the judgment of a Court not subject to our revision; but it has much in common with such a judgment. The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal concerns, practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly, and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. The maxim that there is no wrong without a remedy, does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal, and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin; nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and

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" cruel war. The maxim means only that legal wrong " and legal remedy are correlative terms; and it would " be more intelligibly and correctly stated, if it were " reversed, so as to stand, 'Where there is no legal " remedy, there is no legal wrong.'"[1]

Law as to effect of resolutions of either House.

The law therefore stands thus. Either House of Parliament has the fullest power over its own proceedings, and can, like a Court, commit for contempt any person who, in the judgment of the House, is guilty of insult or affront to the House. The *Case of the Sheriff of Middlesex*[2] carries this right to the very farthest point. The Sheriff was imprisoned for contempt under a warrant issued by the Speaker. Every one knew that the alleged contempt was nothing else than obedience by the Sheriff to the judgment of the Court of Queen's Bench in the case of *Stockdale* v. *Hansard*, and that the Sheriff was imprisoned by the House because under such judgment he took the goods of the defendant Hansard in execution. Yet when the Sheriff was brought by *Habeas Corpus* before the Queen's Bench the Judges held that they could not inquire what were the contempts for which the Sheriff was committed by the House. The Courts, in other words, do not claim any right to protect their own officials from being imprisoned by the House of Commons for alleged contempt of the House, even though the so-called contempt is nothing else than an act of obedience to the Courts. A declaration or resolution of either House, on the other hand, is not in any sense a law. Suppose that *X* were by order of the House of Commons to assault *A* out of the House, irrespective of any act done in the House, and not

[1] *Bradlaugh* v. *Gossett*, 12 Q. B. D. 271, 285. [2] 11 A. & E. 273.

under a warrant committing *A* for contempt; or suppose that *X* were to commit some offence by which he incurred a fine under some Act of Parliament, and that such fine were recoverable by *A* as a common informer. No resolution of the House of Commons ordering or approving of *X's* act could be pleaded by *X* as a legal defence to proceedings, either civil or criminal, against him.[1] If proof of this were wanted it would be afforded by the Act 3 & 4 Vict. c. 9. The object of this Act, passed in consequence of the controversy connected with the case of *Stockdale* v. *Hansard*, is to give summary protection to persons employed in the publication of Parliamentary papers, which are, it should be noted, papers published by the order of one or other of the Houses of Parliament. The necessity for such an Act is the clearest proof that an order of the House is not of itself a legal defence for the publication of matters which would otherwise be libellous. The House of Commons "by "invoking the authority of the whole Legislature to "give validity to the plea they had vainly set up in the "action [of *Stockdale* v. *Hansard*] and by not appealing against the judgment of the Court of Queen's "Bench, had, in effect, admitted the correctness of that "judgment and affirmed the great principle on which "it was founded, viz. that no single branch of the "Legislature can, by any assertion of its alleged "privileges, alter, suspend, or supersede any known "law of the land, or bar the resort of any Englishman "to any remedy, or his exercise and enjoyment of "any right, by that law established."[2]

[1] Conf. *Attorney-General* v. *Bradlaugh*, 14 Q. B. D. (C. A.), 667.

[2] Arnould, *Memoir of Lord Denman*, ii. p. 70. Nothing is harder

Part I. The Constituencies.

(iii.) *The Vote of the Parliamentary Electors.*—Expressions are constantly used in the course of political discussions which imply that the body of persons entitled to choose members of Parliament possess under the English constitution some kind of legislative authority. Such language is, as we shall see, not without a real meaning;[1] it points to the important consideration that the wishes of the constituencies influence the action of Parliament. But

to define than the extent of the indefinite powers or rights possessed by either House of Parliament under the head of privilege or law and custom of Parliament. The powers exercised by the Houses, and especially in practice by the House of Commons, make a near approach to an authority above that of the ordinary law of the land. Parliamentary privilege has from the nature of things never been the subject of precise legal definition. One or two points are worth notice as being clearly established.

1. Either House of Parliament may commit for contempt, and the Courts will not go behind the committal and inquire into the facts constituting the alleged contempt. Hence either House may commit to prison for contempt any person whom the House think guilty of contempt.

2. The House of Lords have power to commit an offender to prison for a specified term, even beyond the duration of the session (May, *Parliamentary Practice* (9th ed.), p. 111). But the House of Commons do not commit for a definite period, and prisoners committed by the House are, if not sooner discharged, released from their confinement on a prorogation. If they were held longer in custody they would be discharged by the courts upon a writ of Habeas Corpus (May, *Parliamentary Practice*, chap. iii.)

3. A libel upon either House of Parliament or upon a member thereof, in his character of a member, has been often treated as a contempt. (*Ibid.*)

4. The Houses and all the members thereof have all the privileges as to freedom of speech, etc., necessary for the performance of their duties. (See generally May's *Parliamentary Practice* (9th ed.), chap. iii.) Compare as to Parliamentary privilege *Shaftesbury's Case*, 6 St. Tr. 1269; *Flower's Case*, 8 T. R. 314; *Ashby* v. *White*, 1 Sm. L. Cas. (7th ed.), 251; *Wilkes's Case*, 19 St. Tr. 1153; *Burdett* v *Colman*, 14 East, 163; *Rex* v. *Creevy*, 1 M. & S. 273; *Clarke* v. *Bradlaugh*, 7 Q. B. D. 38, 8 App. Cas. 354; *The Attorney-General* v. *Bradlaugh*, 14 Q. B. D. 667.

[1] See p. 69, *post*.

any expressions which attribute to Parliamentary electors a legal part in the process of law-making are quite inconsistent with the view taken by the law of the position of an elector. The sole legal right of electors under the English constitution is to elect members of Parliament. Electors have no legal means of initiating, of sanctioning, or of repealing the legislation of Parliament. No Court will consider for a moment the argument that a law is invalid as being opposed to the opinion of the electorate; their opinion can be legally expressed through Parliament, and through Parliament alone. This is not a necessary incident of representative government. In Switzerland no change can be introduced in the constitution[1] which has not been submitted for approval or disapproval to all male citizens who have attained their majority; and even an ordinary law which does not involve a change in the constitution may, after it has been passed by the Federal Assembly, be submitted on the demand of a certain number of citizens to a popular vote, and is annulled if a vote is not obtained in its favour.[2]

The Courts.

(iv.) *The Law Courts.*—A large proportion of English law is in reality made by the judges, and whoever wishes to understand the nature and the extent of judicial legislation in England, should read Professor Pollock's admirable essay on the *Science of Case Law.*[3] The topic is too wide a one to be considered at any length in these lectures. All that we

[1] *Constitution Fédérale de la Confédération Suisse*, Arts. 118-121; see Adams, *The Swiss Confederation*, chap. vi.

[2] *Constitution Fédérale de la Confédération Suisse*, Art. 89.

[3] Pollock, *Essays in Jurisprudence and Ethics*, p. 237.

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need note is that the adhesion by our judges to precedent, that is, their habit of deciding one case in accordance with the principle, or supposed principle, which governed a former case, leads inevitably to the gradual formation by the Courts of fixed rules for decision, which are in effect laws. This judicial legislation might appear, at first sight, inconsistent with the supremacy of Parliament. But this is not so. English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges. Judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament.

Alleged limitations.

B. *Alleged legal limitations on the legislative sovereignty of Parliament.*—All that can be urged as to the speculative difficulties of placing any limits whatever on sovereignty has been admirably stated by Austin and by Professor Holland.[1] With these difficulties we have, at this moment, no concern. Nor is it necessary to examine whether it be or be not true, that there must necessarily be found in every state some person, or combination of persons, which, according to the constitution, whatever be its form, can legally change every law, and therefore constitutes the legally supreme power in the state. Our whole business is now to carry a step further the proof that, under the English constitution, Parliament does constitute such a supreme legislative authority

[1] See Austin, *Jurisprudence*, i. (4th ed.), pp. 270-274, and Holland, *Jurisprudence* (4th ed.), pp. 45-47 and 304, 305. The nature of sovereignty is also stated with brevity and clearness in Lewis, *Use and Abuse of Political Terms*, pp. 37-53.

or sovereign power as, according to Austin and other jurists, must exist in every civilised state, and for that purpose to examine into the validity of the various suggestions, which have from time to time been made, as to the possible limitations on Parliamentary authority, and to show that none of them are countenanced by English law.

The suggested limitations are three in number.[1]

Moral law.

First. Acts of Parliament, it has been asserted, are invalid if they are opposed to the principles of morality or to the doctrines of international law. Parliament, it is in effect asserted, cannot make a law opposed to the dictates of private or public morality. Thus Blackstone lays down in so many words that the "law of nature being co-eval with mankind, and "dictated by God himself, is of course superior in "obligation to any other. It is binding over all the "globe, in all countries, and at all times: no human "laws are of any validity if contrary to this; and such "of them as are valid derive all their force and all "their authority, mediately or immediately, from this "original;"[2] and expressions are sometimes used by modern judges which imply that the Courts might refuse to enforce statutes going beyond the proper limits (internationally speaking) of Parliamentary

[1] Another limitation has been suggested more or less distinctly by judges such as Coke (12 Rep. 76; and Hearn, *Government of England* (2d ed.), pp. 48, 49); an Act of Parliament cannot (it has been intimated) overrule the principles of the common law. This doctrine once had a real meaning (see Maine, *Early History of Institutions* pp. 381, 382), but it has never received systematic judicial sanction and is now obsolete. See Colonial Laws Act, 1865, 28 & 29 Vict. cap. 63.

[2] Blackstone, *Commentaries*, i. p. 40; and see Hearn, *Government of England* (2d ed.), pp. 48, 49.

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authority.[1] But to words such as those of Blackstone, and to the *obiter dicta* of the Bench we must give a very qualified interpretation. There is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament. Language which might seem to imply this amounts in reality to nothing more than the assertion that the judges when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate[2] the ordinary rules of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality. A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral, or because it went beyond the limits of Parliamentary authority. The plain truth is that our tribunals uniformly act on the principle that a law alleged to be a bad law is *ex hypothesi* a law, and therefore entitled to obedience by the Courts.

Prerogative.

Secondly. Doctrines have at times[3] been maintained which went very near to denying the right of Parliament to touch the Prerogative.

In the time of the Stuarts[4] the doctrine was maintained, not only by the King, but by lawyers and

[1] See *Ex parte Blain*, 12 Ch. D. (C. A.), 522, 531, judgment of Cotton, L. J.

[2] See *Colquhoun* v. *Brooks*, 21 Q. B. D. (C. A.), 52; and compare the language of Lord Esher, pp. 57, 58, with the judgment of Fry, L. J., *ibid.* pp. 61, 62.

[3] See Stubbs, *Constitutional History*, ii. pp. 239, 486, 513-515.

[4] Gardiner, *History*, iii. pp. 1-5; compare, as to Bacon's view of the prerogative, *Francis Bacon*, by Edwin A. Abbott, pp. 140, 260, 279.

statesmen who, like Bacon, favoured the increase of royal authority, that the Crown possessed under the name of the "prerogative" a reserve, so to speak, of wide and indefinite rights and powers, and that this prerogative or residue of sovereign power was superior to the ordinary law of the land. This doctrine combined with the deduction from it that the Crown could suspend the operation of statutes, or at any rate grant dispensation from obedience to them, certainly suggested the notion that the high powers of the prerogative were to a certain extent beyond the reach of Parliamentary enactment. We need not, however, now enter into the political controversies of another age. All that need be noticed is that though certain powers—as, for example, the right of making treaties—are now left by law in the hands of the Crown, and are exercised in fact by the executive government, no modern lawyer would maintain that these powers or any other branch of royal authority could not be regulated or abolished by Act of Parliament, or, what is the same thing, that the judges might legally treat as invalid a statute, say, regulating the mode in which treaties are to be made, or making the assent of the Houses of Parliament necessary to the validity of a treaty.[1]

Preceding Acts of Parliament.

Thirdly. Language has occasionally been used in Acts of Parliament which implies that one Parliament can make laws which cannot be touched by any subsequent Parliament, and that therefore the legislative authority of an existing Parliament may be limited by the enactments of its predecessors.

[1] Compare the parliamentary practice in accordance with which the consent or recommendation of the Crown is required to the introduction of bills touching the prerogative or the interests of the Crown.

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The Acts of Union.

That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure. Of statutes intended to arrest the possible course of future legislation, the most noteworthy are the Acts which embody the treaties of Union with Ireland and Scotland. The legislators who passed these Acts assuredly intended to give to certain portions of them more than the ordinary effect of statutes. Yet the history of legislation in respect of these very Acts affords the strongest proof of the futility inherent in every attempt of one sovereign legislature to restrain the action of another equally sovereign body. Thus the Act of Union with Scotland enacts in effect that every professor of a Scotch University shall acknowledge and profess and subscribe the Confession of Faith as his profession of faith, and in substance enacts that this provision shall be a fundamental and essential condition of the treaty or union in all time coming.[1] But this very provision has been in its main part repealed by 16 & 17 Vict. c. 89, s. 1, which relieves most professors in the Scotch universities from the necessity of subscribing the Confession of Faith. Nor is this by any means the only inroad made upon the terms of the Act of Union; from one point of view at any rate the Act 10 Anne, c. 12,[2] restoring the exercise of lay patronage, was a direct infringement upon the Treaty of Union. The intended unchangeableness, and the real liability of these Acts or treaties to be changed by Parliament, comes out even more strikingly in the

[1] See 6 Anne, c. 11, art. 25.

[2] Compare Innes, *Law of Creeds in Scotland*, pp. 118-121.

history of the Act of Union with Ireland. The fifth Article of that Act (39 & 40 Geo. III., c. 67) runs as follows:—"That it be the fifth Article of Union, that "the Churches of England and Ireland as now by law "established, be united into one Protestant episcopal "Church, to be called the United Church of England "and Ireland; and that the doctrine, worship, discipline "and government of the said United Church shall be "and shall remain in full force for ever, as the same are "now by law established for the Church of England; "and that the continuance and preservation of the "said United Church, as the established Church of "England and Ireland, shall be deemed and be taken "to be an essential and fundamental part of the "Union."

That the statesmen who drew and passed this Article meant to bind the action of future Parliaments is apparent from its language. That the attempt has failed of success is apparent to every one who knows the contents of the Irish Church Act, 1869.

Act limiting right of Parliament to tax colonies.

One Act, indeed, of the British Parliament might, looked at in the light of history, claim a peculiar sanctity. It is certainly an enactment of which the terms, we may safely predict, will never be repealed and the spirit will never be violated. This Act is 18 Geo. III., c. 12, passed in 1778. It provides that Parliament "will not impose any duty, tax or assess- "ment whatever, payable in any of his Majesty's "colonies, provinces and plantations in North America "or the West Indies; except only such duties as it may "be expedient to impose for the regulation of commerce; "the net produce of such duties to be always paid and "applied to and for the use of the colony, province or

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"plantation, in which the same shall be respectively "levied, in such manner as other duties collected by "the authority of the respective general courts, or "general assemblies, of such colonies, provinces, or "plantations, are ordinarily paid and applied."[1]

This language becomes the more impressive when contrasted with 6 Geo. III., c. 12, which, being passed in 1766 to repeal the Acts imposing the Stamp Duties, carefully avoids any surrender of Parliament's right to tax the colonies. There is no need to dwell on the course of events of which these two Acts are a statutory record. The point calling for attention is that though policy and prudence condemn the repeal of 18 Geo. III., c. 12, or the enactment of any law inconsistent with its spirit, there is under our constitution no legal difficulty in the way of repealing or overriding this Act. If Parliament were to-morrow to impose a tax, say on Victoria or on the Canadian Dominion, the statute imposing it would be a legally valid enactment, as stated in short by a very judicious writer—"It is certain that a Parliament "cannot so bind its successors by the terms of any "statute, as to limit the discretion of a future Parliament, and thereby disable the Legislature from "entire freedom of action at any future time when "it might be needful to invoke the interposition of "Parliament to legislate for the public welfare."[2]

[1] 18 Geo. III., cap. 12, s. 1.

[2] Todd, *Parliamentary Government in the British Colonies*, p. 192. It is a matter of curious speculation to consider why it is that Parliament, though on several occasions intending to pass Acts which should be unrepealable, has never in reality succeeded in restricting its own legislative authority.

The question may be considered either logically or historically. The logical reason why Parliament has failed in its endeavours to

Parliamentary sovereignty is therefore an undoubted legal fact.

It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parlia-

enact unchangeable enactments is that a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment. An Act, whatever its terms, passed by Parliament might be repealed in a subsequent or indeed in the same session, and there would be nothing to make the authority of the repealing Parliament less than the authority of the Parliament by which the statute intended to be immutable, was enacted. In two ways only can a sovereign power divest itself of authority. It may simply put an end to its own existence. Parliament could extinguish itself by legally dissolving itself and leaving no means whereby a subsequent Parliament could be summoned. (See Bryce, *American Commonwealth*, i. p. 324, note 1.) A step very nearly approaching to this was taken by the Barebones Parliament when, in 1653, it resigned its power into the hands of Cromwell. A sovereign again may transfer sovereign authority to another person or body of persons. The Parliament of England went very near doing this when, in 1539, the Crown was empowered to legislate by proclamation; and though the fact is often overlooked, the Parliaments both of England and of Scotland did, at the Union, each transfer sovereign power to a new sovereign body, namely, the Parliament of Great Britain. This Parliament, however, just because it acquired the full authority of the two legislatures by which it was constituted, became in its turn a legally supreme or sovereign legislature, authorised therefore, though contrary perhaps to the intention of its creators, to modify or abrogate the Act of Union by which it was constituted. If indeed the Act of Union had left alive the Parliaments of England and of Scotland, though for one purpose only, namely, to modify when necessary the Act of Union, and had conferred upon the Parliament of Great Britain authority to pass any law whatever which did not infringe upon or repeal the Act of Union, then the Act of Union would have been a fundamental law unchangeable legally by the British Parliament; but in this case the Parliament of Great Britain would have been, not a sovereign, but a subordinate, legislature, and the ultimate sovereign body, in the technical sense of that term, would have been the two Parliaments of England and of Scotland respectively. The statesmen of these two countries knew full well that to constitute a new sovereign Parliament, and every attempt to tie the hands of such a body necessarily breaks down, on the logical and practical impossibility of combining absolute legislative authority with restrictions on that authority which, if valid, would make it cease to be absolute. "Limited sovereignty," in short, is, in the case of a

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ment, is a fit subject for legislation.[1] There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament.[2]

No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the Courts.[3]

Parliamentary as of every other sovereign, a contradiction in terms. Its frequent and convenient use arises from its in reality signifying and being, by any one who uses words with any accuracy, understood to signify that some person, *e.g.* a king who was at one time a real sovereign or despot, and who is in name treated as an actual sovereign, has become only a part of the power which is legally supreme or sovereign in a particular state.

The historical reason why Parliament has never succeeded in passing immutable laws, or in other words, has always retained its character of a supreme legislature, lies deep in the history of the English people and in the peculiar development of the English constitution. England has, at any rate since the Norman Conquest, been always governed by an absolute legislator. This lawgiver was originally the Crown, and the peculiarity of the process by which the English constitution has been developed lies in the fact that the legislative authority of the Crown has never been curtailed, but has been transferred from the Crown acting alone (or rather in Council) to the Crown acting first together with, and then in subordination to, the Houses of Parliament. Hence Parliament, or in technical terms the King in Parliament, has become—it would perhaps be better to say has always remained—a supreme legislature. It is well worth notice that on the one occasion when English reformers broke from the regular course of English historical development, they framed a written constitution, anticipating in many respects the constitutionalism of the United States, and placed the constitution beyond the control of the ordinary legislature. It is quite clear that, under the Instrument of Government of 1653, Cromwell intended certain fundamentals to be beyond the reach of Parliament. It may be worth observing that the constitution of 1653 placed the Executive beyond the control of the legislature. The Protector under it occupied a position which may well be compared either with that of the American President or of the German Emperor. See Harrison, *Cromwell*, pp. 194-202.

[1] See pp. 39-48, *ante*.

[2] See pp. 48-58, *ante*.

[3] See pp. 58-64, *ante*.

s doctrine of the legislative supremacy of Par- is the very keystone of the law of the consti- But it is, we must admit, a dogma which t always find ready acceptance, and it is well while to note and examine the difficulties mpede the admission of its truth.

Difficulties as to Parliamentary sovereignty.

Difficulties as to the doctrine of Parliamentary gnty.—The reasons why many persons find l to accept the doctrine of Parliamentary gnty are twofold.

Difficulty from Austin's theory.

dogma sounds like a mere application to the constitution of Austin's theory of sovereignty, t intelligent students of Austin must have that Austin's own conclusion as to the invested with sovereign power under the constitution does not agree with the view vard, on the authority of English lawyers, in ctures. For while lawyers maintain that nty resides in "Parliament," *i.e.* in the body ed by the King, the House of Lords, and se of Commons, Austin holds[1] that the power is vested in the King, the House of d the Commons or the electors.

Difficulty from actual limitation on power of Parliament.

one, again, knows as a matter of common t whatever lawyers may say, the sovereign Parliament is not unlimited, and that King, d Commons united do not possess anything "restricted omnipotence"—if the term excused—which is the utmost authority

ustin, *Jurisprudence*, i. (4th ed.), pp. 251-255. Compare nage as to the sovereign body under the constitution of the s. (Austin, *Jurisprudence*, i. (4th ed.), p. 268.)

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ascribable to any human institution. The many enactments, and these laws not in them obviously unwise or tyrannical, which Parli never would and (to speak plainly) never coul If the doctrine of Parliamentary sovereignty in the attribution of unrestricted power to Parli the dogma is no better than a legal fiction, an tainly is not worth the stress here laid upon it.

Both these difficulties are real and rea difficulties. They are, it will be found, to a extent connected together and well repay consideration.

Criticism on Austin's theory.

As to Austin's theory of sovereignty in r to the British constitution.—Sovereignty, like of Austin's conceptions, is a generalisation dr the main from English law, just as the ideas economists of Austin's generation are (to extent) generalisations suggested by the stances of English commerce. In England accustomed to the existence of a supreme le body, *i.e.* a body which can make or unmak law; and which, therefore, cannot be bound law. This is, from a legal point of view, conception of a sovereign, and the case wi the theory of absolute sovereignty has been by English jurists is due to the peculiar h English constitutional law. So far, theref its being true that the sovereignty of Parlia deduction from abstract theories of jurispr critic would come nearer the truth who asse Austin's theory of sovereignty is suggeste position of the English Parliament, just as analysis of the term "law" is at bottom ar

of a typical law, namely, an English criminal statute.

It should, however, be carefully noted that the term "sovereignty," as long as it is accurately employed in the sense in which Austin sometimes[1] uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit. If the term "sovereignty" be thus used, the sovereign power under the English constitution is clearly "Parliament." But the word "sovereignty" is sometimes employed in a political rather than in a strictly legal sense. That body is "politically" sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps in strict accuracy independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate, and certainly of the electorate in combination with the Lords and the Crown, is sure ultimately to prevail on all subjects to be determined by the British government. The matter indeed may be carried a little further, and we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run[2] always enforce their

[1] Compare Austin, *Jurisprudence*, i. (4th ed.), p. 268.

[2] The working of a constitution is greatly affected by the rate at which the will of the political sovereign can make itself felt. In this

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will. But the Courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors. The political sense of the word "sovereignty" is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in some parts of his work Austin has apparently confused the one sense with the other.

"Adopting the language," he writes, "of most of "the writers who have treated of the British constitu-

matter we may compare the constitutions of the United States, of the Swiss Confederacy, and of the United Kingdom respectively. In each case the people of the country, or to speak more accurately the electorate, are politically sovereign. The action of the people of the United States in changing the Federal Constitution is impeded by many difficulties, and is practically slow; the Federal Constitution has, except after the civil war, not been materially changed during the century which has elapsed since its formation. The Articles of the Swiss Confederation admit of more easy change than the Articles of the United States Constitution, and since 1848 have undergone considerable modification. But though in one point of view the present constitution, revised in 1874, may be considered a new constitution, it does not differ fundamentally from that of 1848. As things now stand the people of England can change any part of the law of the constitution with extreme rapidity. Theoretically there is no check on the action of Parliament whatever, and it may be conjectured that in practice any change however fundamental would be at once carried through, which was approved of by one House of Commons, and, after a dissolution of Parliament, was supported by the newly elected House. The paradoxical assertion, therefore, that England is more democratically governed than either the United States or Switzerland, contains an element of truth. The immediate wishes of a decided majority of the electorate of the United Kingdom can be more rapidly carried into legal effect than can the immediate wishes of a majority among the people either of America or of Switzerland.

"tion, I commonly suppose that the present parliament, or the parliament for the time being, is possessed of the sovereignty: or I commonly suppose that the King and the Lords, with the members of the Commons' house, form a tripartite body which is sovereign or supreme. But, speaking accurately, the members of the Commons' house are merely trustees for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the King and the Peers, with the electoral body of the Commons. That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions *delegation* and *representation*. It were absurd to suppose that the delegating empowers the representative party to defeat or abandon any of the purposes for which the latter is appointed: to suppose, for example, that the Commons empower their representatives in parliament to relinquish their share in the sovereignty to the King and the Lords."[1]

Austin owns that the doctrine here laid down by him is inconsistent with the language used by writers who have treated of the British constitution. It is further absolutely inconsistent with the validity of the Septennial Act. Nothing is more certain than that no English judge ever conceded, or under the present constitution can concede, that Parliament is in any legal sense a "trustee"[2] for the electors. Of such a feigned "trust" the Courts know nothing. The plain truth

[1] Austin, *Jurisprudence*, i. (4th ed.), p. 253.

[2] This Austin concedes, but the admission is fatal to the contention that Parliament is not in strictness a sovereign. (See Austin, *Jurisprudence*, i. (4th ed.), pp. 252, 253.)

Part I. is that as a matter of law Parliament is the sovereign power in the state, and that the "supposition" treated by Austin as inaccurate is the correct statement of a legal fact which forms the basis of our whole legislative and judicial system. It is however equally true that in a political sense the electors are the most important part of, we may even say are actually, the sovereign power, since their will is under the present constitution sure to obtain ultimate obedience. The language therefore of Austin is as correct in regard to "political" sovereignty as it is erroneous in regard to what we may term "legal" sovereignty. The electors are a part of and the predominant part of the politically sovereign power. But the legally sovereign power is assuredly, as maintained by all the best writers on the constitution, nothing but Parliament.

It may be conjectured that the error of which (from a lawyer's point of view) Austin has been guilty arises from his feeling, as every person must feel who is not the slave to mere words, that Parliament is (as already pointed out[1]) nothing like an omnipotent body, but that its powers are practically limited in more ways than one. And this limitation Austin expresses, not very happily, by saying that the members of the House of Commons are subject to a trust imposed upon them by the electors. This, however, leads us to our second difficulty, namely, the coexistence of parliamentary sovereignty with the fact of actual limitations on the power of Parliament.

As to the actual limitations on the sovereign power of Parliament.—The actual exercise of authority

[1] See p. 67, *ante*.

Existence of actual limitations to power not inconsistent with sovereignty.

External limit.

by any sovereign whatever, and notably by Parliament, is bounded or controlled by two limitations. Of these the one is an external, the other is an internal limitation.

The external limit to the real power of a sovereign consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws.

This limitation exists even under the most despotic monarchies. A Roman Emperor, or a French King during the middle of the eighteenth century, was (as is the Russian Czar at the present day) in strictness a "sovereign" in the legal sense of that term. He had absolute legislative authority. Any law made by him was binding, and there was no power in the empire or kingdom which could annul such law. It may also be true,—though here we are passing from the legal to the political sense of sovereignty,—that the will of an absolute monarch is in general obeyed by the bulk of his subjects. But it would be an error to suppose that the most absolute ruler which ever existed could in reality make or change every law at his pleasure. That this must be so results from considerations which were long ago pointed out by Hume. Force, he teaches, is in one sense always on the side of the governed, and government therefore in a sense always depends upon opinion. "Nothing," he writes, "appears "more surprising to those, who consider human affairs "with a philosophical eye, than the easiness with which "the many are governed by the few; and the implicit "submission, with which men resign their own senti-"ments and passions to those of their rulers. When "we inquire by what means this wonder is effected, we

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" shall find, that, as Force is always on the side of the " governed, the governors have nothing to support " them but opinion. It is, therefore, on opinion only " that government is founded; and this maxim extends " to the most despotic and most military governments, " as well as to the most free and most popular. The " Soldan of Egypt, or the Emperor of Rome, might " drive his harmless subjects, like brute beasts, against " their sentiments and inclination: But he must, at " least, have led his *mamalukes*, or *prætorian bands*, " like men, by their opinion." [1]

Illustrations of external limit on exercise of sovereign power.

The authority, that is to say, even of a despot, depends upon the readiness of his subjects or of some portion of his subjects to obey his behests; and this readiness to obey must always be in reality limited. This is shown by the most notorious facts of history. None of the early Cæsars could at their pleasure have subverted the worship or fundamental institutions of the Roman world, and when Constantine carried through a religious revolution his success was due to the sympathy of a large part of his subjects. The Sultan could not abolish Mahomedanism. Louis the Fourteenth at the height of his power could revoke the Edict of Nantes, but he would have found it impossible to establish the supremacy of Protestantism, and for the same reason which prevented James the Second from establishing the supremacy of Roman Catholicism. The one king was in the strict sense despotic; the other was as powerful as any English monarch. But the might of each was limited by the certainty of popular disobedience or opposition. The unwillingness of subjects to obey may have reference not only

[1] Hume, *Essays*, i. (1875 ed.), pp. 109, 110.

to great changes, but even to small matters. The French National Assembly of 1871 was emphatically the sovereign power in France. The majority of its members were (it is said) prepared for a monarchical restoration, but they were not prepared to restore the white flag: the army which would have acquiesced in the return of the Bourbons, would not (it was anticipated) tolerate the sight of an anti-revolutionary symbol: "the *chassepots* would go off of themselves." Here we see the precise limit to the exercise of legal sovereignty; and what is true of the power of a despot or of the authority of a constituent assembly is specially true of the sovereignty of Parliament; it is limited on every side by the possibility of popular resistance. Parliament might legally establish an Episcopal Church in Scotland; Parliament might legally tax the Colonies; Parliament might without any breach of law change the succession to the throne or abolish the monarchy; but every one knows that in the present state of the world the British Parliament will do none of these things. In each case widespread resistance would result from legislation which, though legally valid, is in fact beyond the stretch of Parliamentary power. Nay more than this, there are things which Parliament has done in other times, and done successfully, which a modern Parliament would not venture to repeat. Parliament would not at the present day prolong by law the duration of an existing House of Commons. Parliament would not without great hesitation deprive of their votes large classes of Parliamentary electors; and, speaking generally, Parliament would not embark on a course of reactionary legislation; persons who honestly blame

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Catholic Emancipation and lament the disestablishment of the Irish Church do not dream that Parliament could repeal the statutes of 1829 or of 1869. These examples from among a score are enough to show the extent to which the theoretically boundless sovereignty of Parliament is curtailed by the external limit to its exercise.

Internal limit. Illustrations.

The internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs. The Sultan could not if he would change the religion of the Mahomedan world, but if he could do so it is in the very highest degree improbable that the head of Mahomedanism should wish to overthrow the religion of Mahomet; the internal check on the exercise of the Sultan's power is at least as strong as the external limitation. People sometimes ask the idle question why the Pope does not introduce this or that reform? The true answer is that a revolutionist is not the kind of man who becomes a Pope, and that the man who becomes a Pope has no wish to be a revolutionist. Lŏuis the Fourteenth could not in all probability have established Protestantism as the national religion of France; but to imagine Louis the Fourteenth as wishing to carry out a Protestant reformation is nothing short of imagining him to have been a being quite unlike the *Grand Monarque*. Here again the internal check works together with the external check, and the influence of the internal limitation is as great

in the case of a Parliamentary sovereign as of any other; perhaps it is greater. Parliament could not prudently tax the Colonies; but it is hardly conceivable that a modern Parliament, with the history of the last century before its eyes, should wish to tax the colonies. The combined influence both of the external and of the internal limitation on legislative sovereignty is admirably stated in Mr. Leslie Stephen's *Science of Ethics*, whose chapter on "Law and Custom" contains one of the best statements to be met with of the limits placed by the nature of things on the theoretical omnipotence of sovereign legislatures.

"Lawyers are apt to speak as though the legislature were omnipotent, as they do not require to go beyond its decisions. It is, of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as a law means any rule which has been made by the legislature. But from the scientific point of view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, and determined by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it."[1]

Though sovereign power is bounded by an external and an internal limit, neither boundary is very de-

[1] Leslie Stephen, *Science of Ethics*, p. 143.

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Limits may not coincide.

finitely marked, nor need the two precisely coincide. A sovereign may wish to do many things which he either cannot do at all or can do only at great risk of serious resistance, and it is on many accounts worth observation that the exact point at which the external limitation begins to operate, that is, the point at which subjects will offer serious or insuperable resistance to the commands of a ruler whom they generally obey, is never fixed with precision. It would be rash of the Imperial Parliament to abolish the Scotch law Courts, and assimilate the law of Scotland to that of England. But no one can feel sure at what point Scotch resistance to such a change would become serious. Before the War of Secession the sovereign power of the United States could not have abolished slavery without provoking a civil war; after the War of Secession the sovereign power abolished slavery and conferred the electoral franchise upon the Blacks without exciting actual resistance.

Representative government produces coincidence between external and internal limit.

In reference to the relation between the external and the internal limit to sovereignty, representative government presents a noteworthy peculiarity. It is this. The aim and effect of such government is to produce a coincidence, or at any rate diminish the divergence, between the external and the internal limitations on the exercise of sovereign power. Frederick the Great may have wished to introduce, and may in fact have introduced, changes or reforms opposed to the wishes of his subjects. Louis Napoleon certainly began a policy of free trade which would not be tolerated by an assembly which truly represented French opinion. In these instances neither monarch reached the external limit to his sovereign

power, but it might very well have happened that he might have reached it, and have thereby provoked serious resistance on the part of his subjects. There might, in short, have arisen a divergence between the internal and the external check. The existence of such a divergence, or (in other words) of a difference between the permanent wishes of the sovereign, or rather of the King who then constituted a predominant part of the sovereign power, and the permanent wishes of the nation, is traceable in England throughout the whole period beginning with the accession of James the First and ending with the Revolution of 1688. The remedy for this divergence was found in a transference of power from the Crown to the Houses of Parliament; and in placing on the throne rulers who from their position were induced to make their wishes coincide with the will of the nation expressed through the House of Commons; the difference between the will of the sovereign and the will of the nation was terminated by the foundation of a system of real representative government. Where a Parliament truly represents the people, the divergence between the external and the internal limit to the exercise of sovereign power can hardly arise, or if it arises, must soon disappear. Speaking roughly, the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors; that which the majority of the House of Commons command, the majority of the English people usually desire. To prevent the divergence between the wishes of the sovereign and the wishes of subjects is in short the effect, and the only certain

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effect, of bonâ fide representative government. For our present purpose there is no need to determine whether this result be good or bad. An enlightened sovereign has more than once carried out reforms in advance of the wishes of his subjects. This is true both of sovereign kings and, though more rarely, of sovereign Parliaments. But the sovereign who has done this, whether King or Parliament, does not in reality represent his subjects. All that it is here necessary to insist upon is that the essential property of representative government is to produce coincidence between the wishes of the sovereign and the wishes of the subjects; to make, in short, the two limitations on the exercise of sovereignty absolutely coincident. This, which is true in its measure of all real representative government, applies with special truth to the English House of Commons.

"The House of Commons," writes Burke, "was "supposed originally to be *no part of the standing* "*government of this country*. It was considered as a "*control*, issuing *immediately* from the people, and "speedily to be resolved into the mass from whence it "arose. In this respect it was in the higher part of "government what juries are in the lower. The "capacity of a magistrate being transitory, and that of "a citizen permanent, the latter capacity it was hoped "would of course preponderate in all discussions, not "only between the people and the standing authority "of the Crown, but between the people and the fleeting "authority of the House of Commons itself. It was "hoped that, being of a middle nature between subject "and government, they would feel with a more tender "and a nearer interest everything that concerned the

"people, than the other remoter and more permanent "parts of legislature.

"Whatever alterations time and the necessary "accommodation of business may have introduced, this "character can never be sustained, unless the House of "Commons shall be made to bear some stamp of the "actual disposition of the people at large. It would "(among public misfortunes) be an evil more natural "and tolerable, that the House of Commons should be "infected with every epidemical phrensy of the people, "as this would indicate some consanguinity, some "sympathy of nature with their constituents, than that "they should in all cases be wholly untouched by the "opinions and feelings of the people out of doors. By "this want of sympathy they would cease to be a "House of Commons."[1]

[1] Burke, *Works*, i. (1871 ed.), pp. 347, 348.

CHAPTER II

PARLIAMENT AND NON-SOVEREIGN LAW-MAKING BODIES

Part I.

Aim of chapter

IN my last chapter I dwelt upon the nature of Parliamentary sovereignty; my object in this chapter is to illustrate the characteristics of such sovereignty by comparing the essential features of a sovereign Parliament like that of England with the traits which mark non-sovereign law-making bodies.

Parliamentary sovereignty.

A. *Characteristics of Sovereign Parliament.*—The characteristics of Parliamentary sovereignty may be deduced from the term itself. But they are apt to escape the attention of Englishmen, who have been so accustomed to live under the rule of a supreme legislature, that they almost, without knowing it, assume that all legislative bodies are supreme, and hardly therefore keep clear before our minds the properties of a supreme as contrasted with a non-sovereign law-making body. In this matter foreign observers are, as is natural, clearer-sighted than Englishmen. De Lolme, Gneist, and De Tocqueville seize at once upon the sovereignty of Parliament as a salient feature of the English constitution, and recognise the far-reaching effects of this marked peculiarity in our institutions.

"In England," writes De Tocqueville, "the Parliament has an acknowledged right to modify the constitution; as, therefore, the constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a legislative and a constituent assembly."[1]

His expressions are wanting in accuracy, and might provoke some criticism, but the description of the English Parliament as at once "a legislative and a constituent assembly" supplies a convenient formula for summing up the fact that Parliament can change any law whatever. Being a "legislative" assembly it can make ordinary laws, being a "constituent" assembly it can make laws which shift the basis of the constitution. The results which ensue from this fact may be brought under three heads.

No law Parliament cannot change.

First. There is no law which Parliament cannot change, or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character.

A Bill for reforming the House of Commons, a Bill for abolishing the House of Lords, a Bill to give London a municipality, a Bill to make valid marriages celebrated by a pretended clergyman, who is found after their celebration not to be in orders, are each equally within the competence of Parliament, they each may be passed in substantially the same manner, they none of them when passed will be, legally speaking, a whit more sacred or immutable than the

[1] De Tocqueville, i. (translation), p. 96, *Œuvres Complètes*, i. pp. 166, 167.

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others, for they each will be neither more nor less than an Act of Parliament, which can be repealed as it has been passed by Parliament, and cannot be annulled by any other power.

No distinction between constitutional and ordinary laws.

Secondly. There is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional. The very language therefore, expressing the difference between a "legislative" assembly which can change ordinary laws and a "constituent" assembly which can change not only ordinary but also constitutional and fundamental laws, has to be borrowed from the political phraseology of foreign countries.

Relation between Parliamentary sovereignty and an unwritten constitution.

This absence of any distinction between constitutional and ordinary laws has a close connection with the non-existence in England of any written or enacted constitutional statute or charter. De Tocqueville indeed, in common with other writers, apparently holds the unwritten character of the British constitution to be of its essence: "L'Angleterre n'ayant point de constitution écrite, qui peut dire qu'on change sa constitution?"[1] But here De Tocqueville falls into an error, characteristic both of his nation and of the weaker side of his own rare genius. He has treated the form of the constitution as the cause of its substantial qualities, and has inverted the relation of cause and effect. The constitution, he seems to have thought, was changeable because it was not reduced to a written or statutory form. It is far nearer the truth to assert that the constitution has never been reduced to a written or statutory form because

[1] De Tocqueville, *Œuvres Complètes*, i. p. 312.

each and every part of it is changeable at the will of Parliament. When a country is governed under a constitution which is intended either to be unchangeable or at any rate to be changeable only with special difficulty, the constitution, which is nothing else than the laws which are intended to have a character of permanence or immutability, is necessarily expressed in writing, or, to use English phraseology, is enacted as a statute. Where, on the other hand, every law can be legally changed with equal ease or with equal difficulty, there arises no absolute need for reducing the constitution to a written form, or even for looking upon a definite set of laws as specially making up the constitution. One main reason then why constitutional laws have not in England been recognised under that name, and in many cases have not been reduced to the form of a statutory enactment, is that one law, whatever its importance, can be passed and changed by exactly the same method as every other law. But it is a mistake to think that the whole law of the English constitution might not be reduced to writing and be enacted in the form of a constitutional code. The Belgian constitution indeed comes very near to a written reproduction of the English constitution, and the constitution of England might easily be turned into an Act of Parliament without suffering any material transformation of character, provided only that the English Parliament retained—what the Belgian Parliament, by the way, does not possess—the unrestricted power of repealing or amending the constitutional code.

Thirdly. There does not exist in any part of the British Empire any person or body of persons, execu-

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No person entitled to pronounce Act of Parliament void.

tive, legislative or judicial, which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever, except of course its being repealed by Parliament.

These then are the three traits of Parliament sovereignty as it exists in England: first, the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws; thirdly, the non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional.

Flexibility of the constitution.

These traits are all exemplifications of the quality which my friend Mr. Bryce has happily denominated the "flexibility" of the British constitution. Every part of it can be expanded, curtailed, amended or abolished, with equal ease. It is the most flexible polity in existence, and is therefore utterly different in character from the "rigid" constitutions (to use another expression of Mr. Bryce's) the whole or some part of which can be changed only by some extraordinary method of legislation.

Characteristics of non-sovereign law-making bodies.

B. *Characteristics of non-sovereign law-making bodies.*—From the attributes of a sovereign legislature it is possible to infer negatively what are the characteristics all (or some) of which are the marks of a non-sovereign law-making body, and which therefore may be called the marks or notes of legislative subordination.

These signs by which you may recognise the

subordination of a law-making body are, first, the existence of laws affecting its constitution which such body must obey and cannot change; hence, secondly, the formation of a marked distinction between ordinary laws and fundamental laws; and, lastly, the existence of some person or persons, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making body.

Wherever any of these marks of subordination exist with regard to a given law-making body, they prove that it is not a sovereign legislature.

Meaning of term "law-making body."

Observe the use of the words "law-making body."

This term is here employed as an expression which may include under one head[1] both municipal bodies,

[1] This inclusion has been made the subject of criticism.

The objections taken to it are apparently threefold.

First. There is, it is said, a certain absurdity in bringing into one class things so different in importance and in dignity as, for example, the Belgian Parliament and an English School-board. This objection rests on a misconception. It would be ridiculous to overlook the profound differences between a powerful legislature and a petty corporation. But there is nothing ridiculous in calling attention to the points which they have in common. The sole matter for consideration is whether the alleged similarity be real. No doubt when features of likeness between things which differ from one another both in appearance and in dignity is pointed out, the immediate result is to produce a sense of amusement, but the apparent absurdity is no proof that the likeness is unreal or undeserving of notice. A man differs from a rat. But this does not make it the less true or the less worth noting that they are both vertebrate animals.

Secondly. The powers of an English corporation, it is urged, can in general only be exercised reasonably, and any exercise of them is invalid which is not reasonable, and this is not true of the laws made, *e.g.* by the Parliament of a British colony.

This objection admits of more than one reply. It is not universally true that the bye-laws made by a corporation are invalid unless they are reasonable. But let it be assumed for the sake of argument that this restriction is always, as it certainly is often, imposed on the

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such as railway companies, school-boards, town councils, and the like, which possess a limited power of making laws, but are not ordinarily called legislatures, and bodies such as the Parliaments of the British Colonies, of Belgium, or of France, which are ordinarily called "legislatures," but are not in reality sovereign bodies.

The reason for grouping together under one name such very different kinds of "law-making" bodies is,

making of bye-laws. This concession does not involve the consequence that bye-laws do not partake of the nature of laws. All that follows from it is a conclusion which nobody questions, namely, that the powers of a non-sovereign law-making body may be restricted in very different degrees.

Thirdly. The bye-laws of a corporation are, it is urged, not laws, because they affect only certain persons, *e.g.* in the case of a railway company the passengers on the railway, and do not, like the laws of a colonial legislature, affect all persons coming under the jurisdiction of the legislature; or to put the same objection in another shape, the bye-laws of a railway company apply, it is urged, only to persons using the railway, in addition to the general law of the land by which such persons are also bound, whereas the laws, *e.g.*, of the Victorian Parliament constitute the general law of the colony.

The objection is plausible, but does not really show that the similarity insisted upon between the position of a corporation and, *e.g.*, a colonial legislature is unreal. In either case the laws made, whether by the corporation or by the legislature, apply only to a limited class of persons and are liable to be overridden by the laws of a superior legislature. Even in the case of a colony so nearly independent as Victoria, the inhabitants are bound first by the statutes of the Imperial Parliament and in addition thereto by the Acts of the Victorian Parliament. The very rules which are bye-laws when made by a corporation would admittedly be laws if made directly by Parliament. Their character cannot be changed by the fact that they are made by the permission of Parliament through a subordinate legislative body. The Council of a borough, which for the present purpose is a better example of my meaning than a railway company, passes in accordance with the powers conferred upon it by Parliament a bye-law prohibiting processions with music on Sunday. The same prohibition if contained in an Act of Parliament would be admittedly a law. It is none the less a law because made by a body which is permitted by Parliament to legislate.

that by far the best way of clearing up our ideas as to the nature of assemblies which, to use the foreign formula,[1] are "legislative" without being "constituent," and which therefore are not sovereign legislatures, is to analyse the characteristics of societies, such as English railway companies, which possess a certain legislative authority, though the authority is clearly delegated and subject to the obvious control of a superior legislature.

It will conduce to clearness of thought if we divide non-sovereign law-making bodies into the two great classes of obviously subordinate bodies such as corporations, the Council of India, etc., and such legislatures of independent countries as are legislative without being constituent, *i.e.* are non-sovereign legislative bodies.

The consideration of the position of the non-sovereign legislatures which exist under the complicated form of constitution known as a federal government is best reserved for a separate chapter.[2]

I. *Subordinate Law-making Bodies.*

Subordinate bodies.

(i.) *Corporations.*—An English railway company is as good an example as can be found of a subordinate law-making body. Such a company is in the strictest sense a law-making society, for it can under the powers of its Act make laws (called bye-laws) for the regulation (*inter alia*) of travelling upon the railway,[3] and can impose a penalty for the breach of such laws,

Corporations.

[1] See p. 83, *ante*.

[2] See chap. iii.

[3] See especially the Companies Clauses Consolidation Act, 1845,

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which can be enforced by proceedings in the Courts. The rules therefore or bye-laws made by a company within the powers of its Act are "laws" in the strictest sense of the term, as any person will discover to his own cost who, when he travels by rail from Oxford to Paddington, deliberately violates a bye-law duly made by the Great Western Railway Company.

But though an English railway company is clearly a law-making body, it is clearly a non-sovereign law-making body. Its legislative power bears all the marks of subordination.

First. The company is bound to obey laws and (amongst others) the Act of Parliament creating the company, which it cannot change. This is obvious, and need not be insisted upon.

Secondly. There is the most marked distinction between the Act constituting the company, not a line of which can be changed by the company, and the bye-laws which, within the powers of its Act, the company can both make and change. Here we have on a very small scale the exact difference between constitutional laws which cannot, and ordinary laws which can, be changed by a subordinate legislature, *i.e.* by the company. The company, if we may apply to it the terms of constitutional law, is not a constituent, but is within certain limits a legislative assembly; and these limits are fixed by the constitution of the company.

Thirdly. The Courts have the right to pronounce,

(8 & 9 Vict. c. 20), secs. 103, 108-111. This Act is always embodied in the special Act constituting the company. Its enactments therefore form part of the constitution of a railway company.

and indeed are bound to pronounce, on the validity of the company's bye-laws; that is, upon the validity, or to use political terms, on the constitutionality of the laws made by the company as a law-making body. Note particularly that it is not the function of any Court or judge to declare void or directly annul a bye-law made by a railway company. The function of the Court is simply, upon any particular case coming before it which depends upon a bye-law made by a railway company, to decide for the purposes of that particular case whether the bye-law is or is not within the powers conferred by Act of Parliament upon the company; that is to say, whether the bye-law is or is not valid, and to give judgment in the particular case according to the Court's view of the validity of the bye-law. It is worth while to examine with some care the mode in which English judges deal with the inquiry whether a particular bye-law is or is not within the powers given to the company by Act of Parliament, for to understand this point goes a good way towards understanding the exact way in which English or American Courts determine the constitutionality of Acts passed by a non-sovereign legislature.

The London and North-Western Railway Company made a bye-law by which "any person travelling with-
"out the special permission of some duly authorised
"servant of the company in a carriage or by a train of
"a superior class to that for which his ticket was issued
"is hereby subject to a penalty not exceeding forty
"shillings, and shall, in addition, be liable to pay his
"fare according to the class of carriage in which he is
"travelling from the station where the train originally

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"started, unless he shows that he had no intention to "defraud." *X*, with the intention of defrauding the company, travelled in a first-class carriage instead of a second-class carriage for which his ticket was issued, and having been charged under the bye-law was convicted in the penalty of ten shillings, and costs. On appeal by *X*, the Court determined that the bye-law was illegal and void as being repugnant to 8 Vict. c. 20, s. 103, or in effect to the terms of the Act incorporating the company.[1]

A bye-law of the South-Eastern Railway Company required that a passenger should deliver up his ticket to a servant of the company when required to do so, and that any person travelling without a ticket or failing or refusing to deliver up his ticket should be required to pay the fare from the station whence the train originally started to the end of his journey. *X* had a railway ticket enabling him to travel on the South-Eastern Railway. Having to change trains and pass out of the company's station he was asked to show his ticket, and refused to do so, but without any fraudulent intention. He was summoned for breach of the bye-law, and convicted in the amount of the fare from the station whence the train started. The Queen's Bench Division held the conviction wrong on the ground that the bye-law was for several reasons invalid, as not being authorised by the Act under which it purported to be made.[2]

Now in these instances, and in other cases where

[1] *Dyson* v. *L. and N.-W. Ry. Co.*, 7 Q. B. D. 32.

[2] *Saunders* v. *S.-E. Ry. Co.*, 5 Q. B. D. 456. Compare *Bentham* v. *Hoyle*, 3 Q. B. D. 289, and *L. B. and S. C. Ry. Co.* v. *Watson*, 3 C. P. D. 429; 4 C. P. D. (C. A.), 118.

the Courts pronounce upon the validity of a bye-law made by a body (*e.g.* a railway company or a School-board) having powers to make bye-laws enforceable by penalties, it is natural to say that the Courts pronounce the bye-laws valid or invalid. But this is not strictly the case. What the judges determine is not that a particular bye-law is invalid, for it is not the function of the Courts to repeal or annul the bye-laws made by railway companies, but that in a proceeding to recover a penalty from *X* for the breach of a bye-law judgment must be given on the basis of the particular bye-law being beyond the powers of the company, and therefore invalid. It may indeed be thought that the distinction between annulling a bye-law and determining a case upon the assumption of such bye-law being void is a distinction without a difference. But this is not so. The distinction is not without importance even when dealing with the question whether *X*, who is alleged to have broken a bye-law made by a railway company, is liable to pay a fine; it is of first-rate importance when the question before the Courts is one involving considerations of constitutional law, as for example when the Privy Council is called upon, as constantly happens, to determine cases which involve the validity or constitutionality of laws made by the Dominion Parliament or by one of the provincial Parliaments of Canada. The significance, however, of the distinction will become more apparent as we proceed with our subject; the matter of consequence now is to notice the nature of the distinction, and to realise that when a Court in deciding a given case considers whether a bye-law is or is not valid, the

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Council of British India.

Court does a different thing from affirming or annulling the bye-law itself.

(ii.) *Legislative Council of British India.*—British India is governed by a Legislative Council having very wide powers of legislation. This Council, or as it is technically expressed, the "Governor-General in Council," can pass laws as important as any Acts passed by the British Parliament. But the authority of the Council in the way of law-making is as completely subordinate to and as much dependent upon Acts of Parliament as is the power of the London and North-Western Railway Company to make bye-laws.

The legislative powers of the Governor-General and his Council arise from definite Parliamentary enactments.[1] These Acts constitute what may be termed as regards the Legislative Council the constitution of India. Now observe, that under these Acts the Indian Council is in the strictest sense a non-sovereign legislative body, and this independently of the fact that the laws or regulations made by the Governor-General in Council can be annulled or disallowed by the Crown; and note that the position of the Council exhibits all the marks or notes of legislative subordination.

First. The Council is bound by a large number of rules which cannot be changed by the Indian legislative itself, and which can be changed by the superior power of the Imperial Parliament.

Secondly. The Acts themselves from which the

[1] 3 & 4 Will. IV. c. 85, ss. 45-48, 51, 52; 24 & 25 Vict. c. 67, ss. 16-25; 28 & 29 Vict. c. 17.

The Indian Council is in some instances under Acts of Parliament, *e.g.* 24 & 25 Vict. c. 67; 28 & 29 Vict. c. 17; 32 & 33 Vict. c. 98, empowered to legislate for persons outside India.

Council derives its authority cannot be changed by the Council, and hence in regard to the Indian legislative body form a set of constitutional or fundamental laws which, since they cannot be changed by the Council, stand in marked contrast with the laws or regulations which the Council is empowered to make. These fundamental rules contain, it must be added, a number of specific restrictions on the subjects with regard to which the Council may legislate. Thus the Governor-General in Council has no power of making laws which may affect the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of India.[1]

Thirdly. The Courts in India (or in any other part of the British Empire) may, when the occasion arises, pronounce upon the validity or constitutionality of laws made by the Indian Council.

The Courts treat Acts passed by the Indian Council precisely in the same way in which the Queen's Bench Division treats the bye-laws of a railway company. No judge in India or elsewhere ever issues a decree which declares invalid, annuls, or makes void a law or regulation made by the Governor-General in Council. But when any particular case comes before the Courts, whether civil or criminal, in which the rights or liabilities of any party are affected by the legislation of the Indian Council, the Court may have to consider and determine with a view to the particular case whether such legislation was or was not within

[1] See 24 & 25 Vict. c. 67, s. 22.

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the legal powers of the Council, which is of course the same thing as adjudicating as regards the particular case in hand upon the validity or constitutionality of the legislation in question. Thus suppose that *X* is prosecuted for the breach of a law or regulation passed by the Council, and suppose the fact to be established past a doubt that *X* has broken this law. The Court before which the proceedings take place, which must obviously in the ordinary course of things be an Indian Court, may be called upon to consider whether the regulation which *X* has broken is within the powers given to the Indian Council by the Acts of Parliament making up the Indian constitution. If the law is within such powers, or, in other words, is constitutional, the Court will by giving judgment against *X* give full effect to the law, just as effect is given to the bye-law of a railway company by the tribunal before whom an offender is sued pronouncing judgment against him for the penalty. If, on the other hand, the Indian Court deem that the regulation is *ultra vires* or unconstitutional, they will refuse to give effect to it, and treat it as void by giving judgment for the defendant on the basis of the regulation being invalid or having no legal existence. On this point the *Empress* v. *Burah*[1] is most instructive. The details of the case are immaterial; the noticeable thing is that the High Court held a particular legislative enactment of the Governor-General in Council to be in excess of the authority given to him by the Imperial Parliament and therefore invalid, and on this ground entertained an appeal from two prisoners which, if the enactment

[1] 3 Ind. L. R. (Calcutta Series), p. 63.

had been valid, the Court would admittedly have been incompetent to entertain. The Privy Council, it is true, held on appeal[1] that the particular enactment was within the legal powers of the Council and therefore valid, but the duty of the High Court of Calcutta to consider whether the legislation of the Governor-General was or was not constitutional, was not questioned by the Privy Council. To look at the same thing from another point of view, the Courts in India treat the legislation of the Governor-General in Council in a way utterly different from that in which any English Court can treat the Acts of the Imperial Parliament. An Indian tribunal may be called upon to say that an Act passed by the Governor-General need not be obeyed because it is unconstitutional or void. No British Court can give judgment, or ever does give judgment, that an Act of Parliament need not be obeyed because it is unconstitutional. Here, in short, we have the essential difference between subordinate and sovereign legislative power.[2]

English colonies.

(iii.) *English Colonies with Representative Governments.*—Many English colonies, and notably Victoria (to which country our attention had best for the sake of clearness be confined), possess representative assemblies which occupy a somewhat peculiar position.

The Victorian Parliament exercises throughout the colony[3] all the ordinary powers of a sovereign

[1] *Reg.* v. *Burah*, 3 App. Cas. 889.

[2] See especially *Empress* v. *Burah and Book Singh*, 3 Ind. L. R. (Calcutta Series, 1878), 63, 86-89, for the judgment of Markby J.

[3] No colonial legislature has as such any authority beyond the territorial limits of the colony. This forms a considerable restriction

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Powers exercised by colonial Parliaments.

assembly such as the Parliament of Great Britain. It makes and repeals laws, it puts Ministries in power and dismisses them from office, it controls the general policy of the Government, and generally makes its will felt in the transaction of affairs after the manner of the Parliament at Westminster. An ordinary observer would, if he looked merely at the everyday proceedings of the legislature which meets at Melbourne, have no reason to pronounce it a whit less powerful within its sphere than the Parliament of Great Britain. No doubt the assent of the Governor is needed in order to turn colonial Bills into laws: and further investigation would show our inquirer that for the validity of any colonial Act there is required, in addition to the assent of the Governor, the sanction, either express or implied, of the Crown. But these assents are constantly given almost as a matter of course, and may be compared (though not with absolute correctness) to the Crown's so-called "veto" or right of refusing assent to Bills which have passed through the Houses of Parliament.

Limit to powers

Yet for all this, when the matter is further looked into, the Victorian Parliament (together with other colonial legislatures) will be found to be a non-

on the powers of a colonial Parliament. Acts, for example, passed by the legislatures of Victoria and of New South Wales, to ensure the mutual extradition of criminals, would be *ultra vires*, and would be treated as invalid by any court in the British dominions. A great part of the Imperial legislation for the colonies arises from the Acts of colonial legislatures having, unless given extended operation by some Imperial statute, no effect beyond the limits of the colony.

In various instances Imperial Acts have given extended power of legislation to colonial legislatures. Of such Acts the Copyright Act, 1886, is an example, and sometimes extra-territorial effect is given to colonial legislation by orders in Council authorised by a statute of the United Kingdom. See the Extradition Act, 1870.

sovereign legislative body, and bears decisive marks of legislative subordination. The action of the Victorian Parliament is restrained by laws which it cannot change, and are changeable only by the Imperial Parliament; and further, Victorian Acts, even when assented to by the Crown, are liable to be treated by the Courts in Victoria and elsewhere throughout the British dominions as void or unconstitutional, on the ground of their coming into conflict with laws of the Imperial Parliament, which the Victorian legislature has no authority to touch.

That this is so becomes apparent the moment we realise the exact relation between colonial and Imperial laws. The matter is worth some little examination, both for its own sake and for the sake of the light it throws on the sovereignty of Parliament.

The charter of colonial legislative independence is "an Act to remove doubts as to the validity of colonial laws," known as the "Colonial Laws Act, 1865."

Colonial Laws Act, 1865.

This statute seems (oddly enough) to have passed through Parliament without discussion; but it permanently defines and extends the authority of colonial legislatures, and its main provisions are of such importance as to deserve verbal citation:—

"Sec. 2. Any colonial law which is or shall be in "any respect repugnant to the provisions of any Act "of Parliament extending to the colony to which "such law may relate, or repugnant to any order or "regulation made under authority of such Act of Par- "liament, or having in the colony the force and effect "of such Act, shall be read subject to such Act, order,

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" or regulation, and shall, to the extent of such repug-
" nancy, but not otherwise, be and remain absolutely
" void and inoperative.

" 3. No colonial law shall be or be deemed to
" have been void or inoperative on the ground of
" repugnancy to the law of England, unless the same
" shall be repugnant to the provisions of some such
" Act of Parliament, order, or regulation as aforesaid.

" 4. No colonial law, passed with the concurrence
" of or assented to by the Governor of any colony, or
" to be hereafter so passed or assented to, shall be or be
" deemed to have been void or inoperative, by reason
" only of any instructions with reference to such law
" or the subject thereof which may have been given to
" such Governor by or on behalf of Her Majesty, by any
" instrument other than the letters-patent or instru-
" ment authorising such Governor to concur in passing
" or to assent to laws for the peace, order, and good
" government of such colony, even though such in-
" structions may be referred to in such letters-patent
" or last-mentioned instrument.

" 5. Every colonial legislature shall have, and be
" deemed at all times to have had, full power within
" its jurisdiction to establish courts of judicature, and
" to abolish and reconstitute the same, and to alter the
" constitution thereof, and to make provision for the
" administration of justice therein; and every repre-
" sentative legislature shall, in respect to the colony
" under its jurisdiction, have, and be deemed at all
" times to have had, full power to make laws respect-
" ing the constitution, powers, and procedure of such
" legislature; provided that such laws shall have been
" passed in such manner and form as may from time

" to time be required by any Act of Parliament, letters-patent, order in council, or colonial law for the time being in force in the said colony."[1]

The importance, it is true, of the Colonial Laws Act, 1865, may well be either exaggerated or underrated. The statute is in one sense less important than it at first sight appears, because the principles laid down therein were, before its passing, assumed to be good law and to govern the validity of colonial legislation. From another point of view the Act is of the highest importance, because it determines, and gives legislative authority to, principles which had never before been accurately defined, and had been occasionally treated as open to doubt. In any case the terms of the enactment make it now possible to state with precision the limits which bound the legislative authority of a colonial Parliament.

The Victorian Parliament may make laws opposed to the English common law, and such laws (on receiving the required assents) are perfectly valid.

Thus a Victorian Act which changed the common law rules as to the descent of property, which gave the Governor authority to forbid public meetings, or which abolished trial by jury, might be inexpedient or unjust, but would be a perfectly valid law, and would be recognised as such by every tribunal throughout the British Empire.[2]

The Victorian Parliament, on the other hand, cannot make any laws inconsistent with any Act of Parliament, or with any part of an Act of Parlia-

[1] 28 & 29 Vict. c. 63, ss. 2-5.

[2] Assuming of course that such Acts are not inconsistent with any imperial statute applying to Victoria.

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ment, intended by the Imperial Parliament to apply to Victoria.

Suppose, for example, that the British Parliament were to pass an Act providing a special mode of trial in Victoria for particular classes of offences committed there, no enactment of the colonial Parliament, which provided that such offences should be tried otherwise than as directed by the imperial statute, would be of any legal effect. So again, no Victorian Act would be valid that legalised the slave trade in the face of 5 Geo. IV, c. 113, which prohibits slave trading throughout the British dominions; nor would Acts passed by the Victorian Parliament be valid which repealed, or invalidated, several provisions of the Merchant Shipping Acts meant to apply to the colonies, or which deprived a discharge under the English Bankruptcy Act of the effect which, in virtue of the imperial statute, it has as a release from debts contracted in any part whatever of the British dominions. No colonial legislature, in short, can override imperial legislation which is intended to apply to the colonies. Whether the intention be expressed in so many words, or be apparent only from the general scope and nature of the enactment, is immaterial. Once establish that an imperial law is intended to apply to Victoria, and the consequence follows that any Victorian enactment which contravenes that law is invalid and unconstitutional.[1]

Hence the Courts in Victoria, as also in the rest of the British dominions, may be called upon to

[1] See Tarring, *Law Relating to the Colonies*, pp. 79-86, for a list of imperial statutes which relate to the colonies in general, and which therefore no colonial legislation can contravene.

adjudicate upon the validity or constitutionality of any Act of the Victorian Parliament. For if a Victorian law really contradicts the provisions of an Act of Parliament extending to Victoria, no Court throughout the British dominions could legally, it is clear, give effect to the Victorian enactment. This is an inevitable result of the legislative sovereignty exercised by the Imperial Parliament. In the supposed case the Victorian Parliament commands the judges to act in a particular manner, and the Imperial Parliament commands them to act in another manner. Of these two commands the order of the Imperial Parliament is the one which must be obeyed. This is the very meaning of Parliamentary sovereignty. Whenever, therefore, it is alleged that any enactment of the Victorian Parliament is repugnant to the provisions of any Act of Parliament extending to the colony, the tribunal before which the objection is raised must pronounce upon the validity or constitutionality of the colonial law.[1]

Acts of colonial legislature may be pronounced void by Courts.

The constitution of Victoria is created by and depends upon the Act of Parliament 18 & 19 Vict. c. 55. One might therefore expect that the Victorian Parliament would exhibit that "mark of subordination" which consists in the inability of a legislative body to change fundamental or constitutional laws, or (what is the same thing) in the clearly drawn distinction between ordinary laws which the legislature can change and laws of the constitution which it cannot change, at any rate when acting in its ordinary legislative character.

Colonial Parliament may be a "constituent" as well as legislative body.

[1] See *Powell* v. *Apollo Candle Co.*, 10 App. Cas. 282; *Hodge* v. *The Queen*, 9 App. Cas. 117.

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But this anticipation is hardly borne out by an examination into the Acts creating the Victorian constitution. A comparison of the Colonial Laws Act, 1865, s. 5, with 18 & 19 Vict. c. 55, Sched. I. sect. 60, shows that the Parliament of Victoria can change the articles of the constitution. This power, derived as it is from an imperial statute, is of course in no way inconsistent with the legal sovereignty of the Imperial Parliament. Though, further, a Victorian law may alter the articles of the constitution, that law must in some cases be passed in a manner different from the mode in which other laws are passed. The Victorian constitution does contain a faint recognition of the difference between fundamental and other laws. Still the recognition is so very faint that one may fairly assert that the Victorian Parliament (in common with many other colonial legislative assemblies) is, though a subordinate, yet at once a legislative and a constituent assembly.[1] It is a "subordinate" assembly because its powers are limited by the legislation of the Imperial Parliament; it is a "constituent" assembly since it can change the articles of the Victorian constitution.

Reason of this.

The authority of the Victorian Parliament to change the articles of the Victorian constitution is from several points of view worth notice.

We have here a decisive proof that there is no necessary connection between the written character and the immutability of a constitution. The Victorian constitution is to be found in a written document; it is a statutory enactment. Yet the articles of this constitutional statute can be changed by the

[1] See p. 83, *ante*.

Parliament which it creates, and changed almost, though not absolutely, in the same manner as any other law. This may seem an obvious matter enough, but writers of eminence so often use language which implies or suggests that the character of a law is changed by its being expressed in the form of a statute as to make it worth while noting that a statutory constitution need not be in any sense an immutable constitution. The readiness again with which the English Parliament has conceded constituent powers to colonial legislatures shows how little hold is exercised over Englishmen by that distinction between fundamental and non-fundamental laws which runs through almost all the constitutions not only of the Continent but also of America. The explanation appears to be that in England we have long been accustomed to consider Parliament as capable of changing one kind of law with as much ease as another. Hence when English statesmen gave Parliamentary government to the colonies, they almost as a matter of course bestowed upon colonial legislatures authority to deal with every law, whether constitutional or not, which affected the colony, subject of course to the proviso, rather implied than expressed, that this power should not be used in a way inconsistent with the supremacy of the British Parliament. The colonial legislatures, in short, are within their own sphere copies of the Imperial Parliament. They are within their own sphere sovereign bodies; but their freedom of action is controlled by their subordination to the Parliament of the United Kingdom.

The question may naturally be asked how the

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How conflicts between imperial and colonial legislation avoided.

large amount of colonial liberty conceded to countries like Victoria has been legally reconciled with Imperial sovereignty?

The inquiry lies a little outside our subject, but is not really foreign to it, and well deserves an answer. Nor is the reply hard to find if we keep in mind the true nature of the difficulty which needs explanation.

The problem is not to determine what are the means by which the English government keeps the colonies in subjection, or maintains the political sovereignty of Great Britain. This is a matter of politics with which this book has no concern.

The question to be answered is how (assuming the law to be obeyed throughout the whole of the British Empire) colonial legislative freedom is made compatible with the legislative sovereignty of Parliament? How are the British Parliament and the colonial legislatures prevented from encroaching on each other's spheres?

No one will think this inquiry needless who remarks that in confederations, such as the United States, or the Canadian Dominion, the Courts are constantly occupied in determining the boundaries which divide the legislative authority of the Central Government from that of the State Legislatures.

Conflicts averted by (i.) supremacy of British Parliament;

The assertion may sound paradoxical, but is nevertheless strictly true, that the acknowledged legal supremacy of Parliament is one main cause of the wide power of legislation allowed to colonial assemblies.

The constitutions of the colonies depend directly or indirectly upon imperial statutes. No lawyer questions that Parliament could legally abolish any

colonial constitution, or that Parliament can at any moment legislate for the colonies and repeal or override any colonial law whatever. Parliament moreover constantly does pass Acts affecting the colonies, and the colonial,[1] no less than the English, Courts completely admit the principle that a statute of the Imperial Parliament binds any part of the British dominions to which the statute is meant to apply. But when once this is admitted, it becomes obvious that there is little necessity for defining or limiting the sphere of colonial legislation. If an Act of the Victorian Parliament contravenes an imperial statute, it is for legal purposes void; and if an Act of the Victorian Parliament, though not infringing upon any statute, is so opposed to the interests of the Empire that it ought not to be passed, the British Parliament may render the Act of no effect by means of an imperial statute.

(ii.) right of veto.

This course however is rarely, if ever, necessary; for Parliament exerts authority over colonial legislation by in effect regulating the use of the Crown's "veto" in regard to colonial Acts. This is a matter which itself needs a little explanation.

The Crown's right to refuse assent to bills which have passed through the Houses of Parliament is practically obsolete.[2] The power of the Crown to

[1] See Todd, *Parliamentary Government*, pp. 168-192.

[2] This statement has been questioned—see Hearn (2d ed.), p. 63—but is, it is submitted, correct. The so-called "veto" has never been employed as regards any public bill since the accession of the House of Hanover. When George the Third wished to stop the passing of the celebrated India Bill, he abstained from using the Crown's right to dissent from proposed legislation, but availed himself of his influence in the House of Lords to procure the rejection of the measure. No stronger proof could be given that the right of veto was more than

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negative or veto the bills of colonial legislatures stands on a different footing. It is virtually, though not in name, the right of the Imperial Parliament to limit colonial legislative independence, and is frequently exercised.

This check on colonial legislation is exerted in two different manners.[1]

a century ago already obsolete. But the statement that a power is practically obsolete does not involve the assertion that it could under no conceivable circumstances be revived. On the whole subject of the veto, and the different senses in which the expression is used, the reader should consult an excellent article by Professor Orelli of Zurich, to be found under the word "Veto" in *Encyclopædia Britannica* (9th ed.), xxiv. p. 208.

[1] The mode in which the power to veto colonial legislation is exercised may be best understood from the following extract from the Rules and Regulations printed by the Colonial Office :—

RULES AND REGULATIONS

CHAPTER III

§ 1. *Legislative Councils and Assemblies*

48. In every colony the Governor has authority either to give or to withhold his assent to laws passed by the other branches or members of the Legislature, and until that assent is given no such law is valid or binding.

49. Laws are in some cases passed with suspending clauses ; that is, although assented to by the Governor they do not come into operation or take effect in the colony until they shall have been specially confirmed by Her Majesty, and in other cases Parliament has for the same purpose empowered the Governor to reserve laws for the Crown's assent, instead of himself assenting or refusing his assent to them.

50. Every law which has received the Governor's assent (unless it contains a suspending clause) comes into operation immediately, or at the time specified in the law itself. But the Crown retains power to disallow the law ; and if such power be exercised . . . the law ceases to have operation from the date at which such disallowance is published in the colony.

51. In colonies having representative assemblies the disallowance of any law, or the Crown's assent to a reserved bill, is signified by order in council. The confirmation of an Act passed with a suspending clause, is not signified by order in council unless this mode of confirmation is required by the terms of the suspending clause itself, or by some special provision in the constitution of the colony.

52. In Crown colonies the allowance or disallowance of any law is generally signified by despatch.

53. In some cases a period is limited, after the expiration of which local enactments, though not actually disallowed, cease to have the authority of law in the colony, unless before the lapse of that time Her Majesty's confirmation of them shall have been signified there ; but the general rule is otherwise.

54. In colonies possessing representative assemblies, laws purport to be made by the Queen on by the Governor on Her Majesty's behalf or sometimes by the

How right of "veto" exercised.

The Governor of a colony, say Victoria, may directly refuse his assent to a bill passed by both Houses of the Victorian Parliament. In this case the bill is finally lost, just as would be a bill which had been rejected by the colonial council, or as would be a bill passed by the English Houses of Parliament if the Crown were to exert the obsolete prerogative of

Governor alone, omitting any express reference to Her Majesty, with the advice and consent of the council and assembly. They are almost invariably designated as Acts. In colonies not having such assemblies, laws are designated as ordinances, and purport to be made by the Governor, with the advice and consent of the Legislative Council (or in British Guiana of the Court of Policy).

55. In West Indian Islands or African settlements which form part of any general government, every bill or draft ordinance must be submitted to the Governor-in-Chief before it receives the assent of the lieutenant-governor or administrator. If the Governor-in-Chief shall consider any amendment indispensable, he may either require that amendment to be made before the law is brought into operation, or he may authorise the officer administering to assent to the bill or draft on the express engagement of the legislature to give effect to the Governor-in-Chief's recommendation by a supplementary enactment.

The "veto," it will be perceived, may be exercised by one of two essentially different methods: first, by the refusal of the Governor's assent; secondly, by the exercise of the royal power to disallow laws even when assented to by the Governor. As further, the Governor may reserve bills for the royal consideration, and as colonial laws are sometimes passed containing a clause which suspends their operation until the signification of the royal assent, the check on colonial legislation may be exercised in four different forms—

(1) The refusal of the Governor's assent to a bill.
(2) Reservation of a bill for the consideration of the Crown, followed by the refusal of the royal assent.
(3) The insertion in a bill of a clause preventing it from coming into operation until the signification of the royal assent thereto, and the want of such royal assent.
(4) The disallowance by the Crown of a law passed by the Colonial Parliament with the assent of the Governor.

The reader should note, however, the essential difference between the three first modes and the fourth mode of checking colonial legislation. Under the three first a proposed law passed by the colonial legislature never comes into operation in the colony. Under the fourth a colonial law which has come into operation in the colony is annulled or disallowed by the Crown from the date of such disallowance. In the case of more than one colony, such disallowance must, under the Constitution Act or letters-patent, be signified within two years. See the British North America Act, 1867, sec. 56.

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The Governor, on the other hand, may, as representing the Crown, give his assent to a Victorian bill. The bill thereupon comes into force throughout Victoria. But such a bill, though for a time a valid Act, is not finally made law even in Victoria, since the Crown may, after the Governor's assent has been given, disallow the colonial Act. The case is thus put by Mr. Todd :—"Although a governor as representing "the Crown is empowered to give the royal assent to "bills, this act is not final and conclusive; the Crown "itself having, in point of fact, a second veto. All "statutes assented to by the governor of a colony go "into force immediately, unless they contain a clause "suspending their operation until the issue of a procla- "mation of approval by the queen in council, or some "other specific provision to the contrary; but the "governor is required to transmit a copy thereof to the "secretary of state for the colonies; and the queen in "council may, within two years after the receipt of "the same, disallow any such Act."[1]

The result therefore of this state of things is, that colonial legislation is subject to a real veto on the part of the imperial Government, and no bill which the English Ministry think ought for the sake of imperial interests to be negatived can, though passed by

[1] Todd, *Parliamentary Government in the British Colonies*, p. 137.

the Victorian or other colonial legislature, come finally into force. The home government is certain to negative or disallow any colonial law which either in letter, or in spirit, is repugnant to Parliamentary legislation, and a large number of Acts can be given which on one ground or another have been either not assented to or disallowed by the Crown. In 1868 the Crown refused assent to a Canadian Act reducing the salary of the Governor-General.[1] In 1872 the Crown refused assent to a Canadian Copyright Act because certain parts of it conflicted with imperial legislation. In 1873 a Canadian Act was disallowed as being contrary to the express terms of the British North America Act, 1868; and on similar grounds in 1878 a Canadian Shipping Act was disallowed.[2] So again the Crown has in effect passed a veto upon Australian Acts for checking Chinese immigration. And Acts passed by colonial legislatures, allowing divorce on the ground of the husband's adultery and legalising marriage with a deceased wife's sister, have (though not consistently with the general tenor of our colonial policy) been disallowed by the Crown, that is, in effect by the home government.

The general answer therefore to the inquiry, how colonial liberty of legislation is made legally reconcilable with imperial sovereignty, is that the complete recognition of the supremacy of Parliament obviates the necessity for carefully limiting the authority of colonial legislatures, and that the home government, who in effect represent Parliament, retain by the use of the Crown's veto the power of preventing the occurrence of conflicts between colonial and imperial

[1] See Todd, p. 144.

[2] *Ibid.*, pp. 147, 150.

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laws. To this it must be added that imperial treaties legally bind the colonies, and that the "treaty-making power," to use an American expression, resides in the Crown, and is therefore exercised by the home government in accordance with the wishes of the Houses of Parliament, or more strictly of the House of Commons; whilst the authority to make treaties is, except where expressly allowed by Act of Parliament, not possessed by any colonial government.[1]

It should, however, be observed that the legislature of a self-governing colony is free to determine whether or not to pass laws necessary for giving effect to a treaty entered into between the imperial government and a foreign power; and further, that there might in practice be great difficulty in enforcing within the limits of a colony the terms of a treaty, *e.g.* as to the extradition of criminals, to which colonial sentiment was opposed. But this does not affect the principle of law that a colony is bound by treaties made by the imperial government, and does not, unless under some special provision of an Act of Parliament, possess authority to make treaties with any foreign power.

Policy of Imperial government not to interfere with action of colonies.

Any one who wishes justly to appreciate the nature and the extent of the control exerted by Great Britain over colonial legislation should keep two points carefully in mind. The tendency, in the first place, of the imperial government is as a matter of policy to interfere less and less with the action of the colonies, whether in the way of law-making or otherwise. Colonial Acts, in the second place, even when

[1] See Todd, *Parliamentary Government in the British Colonies*, pp. 192-218.

inally assented to by the Crown, are, as already pointed out, invalid if repugnant to an Act of Parliament applying to the colony. The imperial policy therefore of non-intervention in the local affairs of British dependencies combines with the supreme legislative authority of the Imperial Parliament to render encroachments by the British Parliament on the sphere of colonial legislation, or by colonial Parliaments on the domain of imperial legislation, of rare occurrence.[1]

II. *Foreign Non-sovereign Legislatures.*

Non-sovereign legislatures of independent nations.

We perceive without difficulty that the Parliaments of even those colonies, such as the Dominion of Canada, which are most nearly independent states, are not in reality sovereign legislatures. This is easily seen, because the sovereign Parliament of Great Britain, which legislates for the whole British Empire, is visible in the background, and because the colonies, however large their practical freedom of action, do not act as independent powers in relation to foreign states; the Parliament of a dependency cannot itself be a sovereign body. It is harder for Englishmen to realise that the legislative assembly of an independent nation may not be a sovereign assembly. Our political habits of thought indeed are so based upon the assumption of Parliamentary omnipotence, that the position of a Parliament which represents an independent nation and yet is not itself a sovereign power is apt to appear to us exceptional or anomalous. Yet whoever examines the

[1] See note 3, p. 97, *ante*.

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constitutions of civilised countries, will find that the legislative assemblies of great nations are, or have been, in many cases legislative without being constituent bodies. To determine in any given case whether a foreign legislature be a sovereign power or not we must examine the constitution of the state to which it belongs, and ascertain whether the legislature whose position is in question bears any of the marks of subordination. Such an investigation will in many or in most instances show that an apparently sovereign assembly is in reality a non-sovereign law-making body.

France.

France has within the last hundred years made trial of at least twelve constitutions.[1]

These various forms of government have, amidst all their differences, possessed in general one common feature. They have most of them been based upon the recognition of an essential distinction between constitutional or "fundamental" laws intended to be either immutable or changeable only with great difficulty, and "ordinary" laws which could be changed by the ordinary legislature in the common course of legislation. Hence under the constitutions which France has from time to time adopted the common Parliament or legislative body has not been a sovereign legislature.

Constitutional monarchy of Louis Philippe.

The constitutional monarchy of Louis Philippe, in outward appearance at least, was modelled on the constitutional monarchy of England. In the Charter not a word could be found which expressly limits the legislative authority possessed by the Crown and the two Chambers, and to an Englishman it

[1] Demombynes, *Les Constitutions Européennes*, ii. (2d ed.), pp. 1-5. See Appendix, Note 1, Rigidity of French Constitutions.

would seem certainly arguable that under the Orleans dynasty the Parliament was possessed of sovereignty. This, however, was not the view accepted among French lawyers. The "immutability of the Constitution of "France," writes De Tocqueville, "is a necessary con- "sequence of the laws of that country. . . . As the "King, the Peers, and the Deputies all derive their "authority from the Constitution, these three powers "united cannot alter a law by virtue of which alone "they govern. Out of the pale of the Constitution "they are nothing; where, then, could they take their "stand to effect a change in its provisions? The alter- "native is clear: either their efforts are powerless "against the Charter, which continues to exist in spite "of them, in which case they only reign in the name "of the Charter; or they succeed in changing the "Charter, and then the law by which they existed "being annulled, they themselves cease to exist. By "destroying the Charter, they destroy themselves. "This is much more evident in the laws of 1830 than "in those of 1814. In 1814 the royal prerogative "took its stand above and beyond the Constitution; "but in 1830 it was avowedly created by, and de- "pendent on, the Constitution. A part, therefore, of "the French Constitution is immutable, because it is "united to the destiny of a family; and the body of "the Constitution is equally immutable, because there "appear to be no legal means of changing it. These "remarks are not applicable to England. That country "having no written Constitution, who can assert when "its Constitution is changed?"[1]

[1] De Tocqueville, *Democracy in America*, ii. (translation), App. pp. 322, 323. *Œuvres Complètes*, i. p. 311.

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De Tocqueville's reasoning[1] may not carry conviction to an Englishman, but the weakness of his argument is of itself strong evidence of the influence of the hold on French opinion of the doctrine which it is intended to support, namely, that Parliamentary sovereignty was not a recognised part of French constitutionalism. The dogma which is so naturally assented to by Englishmen contradicts that idea of the essential difference between constitutional and other laws which appears to have a firm hold on most foreign statesmen and legislators.

Republic of 1848.

The Republic of 1848 expressly recognised this distinction; no single article of the constitution proclaimed on 4th November 1848 could be changed in the same way as an ordinary law. The legislative assembly sat for three years. In the last year of its existence, and then only, it could by a majority of three-fourths, and not otherwise, convoke a constituent body with authority to modify the constitution. This constituent and sovereign assembly differed in numbers, and otherwise, from the ordinary non-sovereign legislature.

Present Republic.

The National Assembly of the existing Republic exerts more direct authority than the English Houses of Parliament; for the French Chamber of Deputies exercises more immediate influence on the appointment of Ministers, and assumes a larger share in the executive functions of government, than does our House of Commons. The President, moreover, does not possess even a theoretical right of veto. For all

[1] His view is certainly paradoxical, for as a matter of fact one provision of the Charter, namely, art. 23, regulating the appointment of Peers, was changed by the ordinary process of legislation. See Law of 29th December 1831, Hélie, *Les Constitutions de la France*, p. 1006.

this, however, the French Parliament is not a sovereign assembly, but is bound by the laws of the constitution in a way in which no law binds our Parliament. The articles of the constitution, or "fundamental laws," stand in a totally different position from the ordinary law of the land. Under article 8 of the constitution, no one of these fundamental enactments can be legally changed otherwise than subject to the following provisions:—

"8. *Les Chambres auront le droit, par délibéra-*
" *tions séparées, prises dans chacune à la majorité*
" *absolue des voix, soit spontanément, soit sur la*
" *demande du Président de la République, de déclarer*
" *qu'il y a lieu de réviser les lois constitutionnelles.—*
" *Après que chacune des deux Chambres aura pris*
" *cette résolution, elles se réuniront en Assemblée*
" *nationale pour procéder à la révision.—Les dé-*
" *libérations portant révision des lois constitution-*
" *nelles, en tout ou en partie, devront être prises à la*
" *majorité absolue des membres composant l'Assemblée*
" *nationale.*"[1]

Supreme legislative power is therefore under the Republic vested not in the ordinary Parliament of two Chambers, but in a "national assembly," or congress, composed of the Chamber of Deputies and the Senate sitting together.

Distinction between flexible and rigid constitutions.

The various constitutions, in short, of France, which are in this respect fair types of continental polities,[2] exhibit, as compared with the expansiveness or

[1] Plouard, *Les Constitutions Françaises*, p. 280. See *La Constitution Française de* 1875, par MM. Alphonse Bard et Robiquet (2d ed.), p. 374.

[2] No constitution better merits study in this as in other respects than the constitution of Belgium. Though formed after the English

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"flexibility" of English institutions, that characteristic which may be conveniently described as "rigidity."[1]

And here it is worth while, with a view to understanding the constitution of our own country, to make perfectly clear to ourselves the distinction already referred to between a "flexible" and a "rigid" constitution.

Flexible constitutions.

A "flexible" constitution is one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body. The "flexibility" of our constitution consists in the right of the Crown and the two Houses to modify or repeal any law whatever; they can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London. With us, laws therefore are called constitutional, because they refer to subjects supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws. And as a matter of fact, the meaning of the word "constitutional" is in England so vague that the term "a constitutional law or enactment" is rarely applied to any English statute as giving a definite description of its character.

A "rigid" constitution is one under which certain

model, it rejects or omits the principle of Parliamentary sovereignty. The ordinary Parliament cannot change anything in the constitution; it is a legislative, not a constituent body; it can declare that there is reason for changing a particular constitutional provision, and having done so is *ipso facto* dissolved (*après cette déclaration les deux chambres sont dissoutes de plein droit*). The new Parliament thereupon elected has a right to change the constitutional article which has been declared subject to change (*Constitution de La Belgique*, Arts. 131, 71).

[1] See Appendix, Note 1, Rigidity of French Constitutions.

Rigid constitutions.

laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws. The "rigidity" of the constitution, say of Belgium or of France, consists in the absence of any right on the part of the Belgian or French Parliament, when acting in its ordinary capacity, to modify or repeal certain definite laws termed constitutional or fundamental. Under a rigid constitution the term "constitutional" as applied to a law has a perfectly definite sense. It means that a particular enactment belongs to the articles of the constitution, and cannot be legally changed with the same ease and in the same manner as ordinary laws. The articles of the constitution will no doubt generally, though by no means invariably, be found to include all the most important and fundamental laws of the state. But it certainly cannot be asserted that where a constitution is rigid all its articles refer to matters of supreme importance. The rule that the French Parliament must meet at Versailles was at one time one of the constitutional laws of the French Republic. Such an enactment, however practically important, would never in virtue of its own character have been termed constitutional; it was constitutional simply because it was included in the articles of the constitution.[1]

[1] The terms "flexible" and "rigid" (originally suggested by my friend, Mr. Bryce) are, it should be remarked, used throughout this work without any connotation either of praise or of blame. The flexibility and expansiveness of the English constitution, or the rigidity and immutability of, *e.g.*, the constitution of the United States, may each be qualities which according to the judgment of different critics deserve either admiration or censure. With such judgments this treatise has no concern. My whole aim is to make clear to my readers the exact difference between a flexible and a rigid constitution. It is not my object to pronounce any opinion on the question whether the flexibility or rigidity of a given polity be a merit or a defect.

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The contrast between the flexibility of the English and the rigidity of almost every foreign constitution suggests two interesting inquiries.

Whether rigidity of constitution secures permanence?

First. Does the rigidity of a constitution secure its permanence and invest the fundamental institutions of the state with practical immutability?

To this inquiry historical experience gives an indecisive answer.

In some instances the fact that certain laws or institutions of a state have been marked off as placed beyond the sphere of political controversy, has, apparently, prevented that process of gradual innovation which in England has, within not much more than sixty years, transformed our polity. The constitution of Belgium has existed for more than half a century; the constitution of the United States will soon have endured for a hundred years; neither of them has during its existence undergone one tithe of the changes which have been experienced by the constitution of England since the death of George the Third. But if the inflexibility of constitutional laws has in certain instances checked the gradual and unconscious process of innovation by which the foundations of a commonwealth are undermined, the rigidity of constitutional forms has in other cases provoked revolution. The twelve unchangeable constitutions of France have each lasted on an average for less than ten years, and have frequently perished by violence. Louis Philippe's monarchy was destroyed within seven years of the time when De Tocqueville pointed out that no power existed legally capable of altering the articles of the Charter. In one notorious instance at least—and other examples of the same phenomenon might be

produced from the annals of revolutionary France—the immutability of the constitution was the ground or excuse for its violent subversion. The best plea for the *Coup d'état* of 1851 was, that while the French people wished for the re-election of the President, the article of the constitution requiring a majority of three-fourths of the legislative assembly in order to alter the law which made the President's re-election impossible, thwarted the will of the sovereign people. Had the Republican Assembly been a sovereign Parliament, Louis Napoleon would have lacked the plea, which seemed to justify, as well as some of the motives which tempted him to commit, the crime of the 2nd of December.

Nor ought the perils in which France was involved by the immutability with which the statesmen of 1848 invested the constitution to be looked upon as exceptional; they arose from a defect which is inherent in every rigid constitution. The endeavour to create laws which cannot be changed is an attempt to hamper the exercise of sovereign power; it therefore tends to bring the letter of the law into conflict with the will of the really supreme power in the state. The majority of French electors were under the constitution the true sovereign of France; but the rule which prevented the legal re-election of the President in effect brought the law of the land into conflict with the will of the majority of the electors, and produced, therefore, as a rigid constitution has a natural tendency to produce, an opposition between the letter of the law and the wishes of the sovereign. If the inflexibility of French constitutions has provoked revolution, the flexibility of English institutions has,

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once at least, saved them from violent overthrow. To a student, who at this distance of time calmly studies the history of the first Reform Bill, it is apparent, that in 1832 the supreme legislative authority of Parliament enabled the nation to carry through a political revolution under the guise of a legal reform.

The rigidity, in short, of a constitution tends to check gradual innovation; but, just because it impedes change, may, under unfavourable circumstances, occasion or provoke revolution.

What are the safeguards against unconstitutional legislation?

Secondly. What are the safeguards which under a rigid constitution can be taken against unconstitutional legislation?

The general answer to our inquiry (which of course can have no application to a country like England, ruled by a sovereign Parliament) is that two methods may be, and have been, adopted by the makers of constitutions, with a view to rendering unconstitutional legislation, either impossible, or inoperative.

Reliance may be placed upon the force of public opinion and upon the ingenious balancing of political powers for restraining the legislature from passing unconstitutional enactments. This system opposes unconstitutional legislation by means of moral sanctions, which resolve themselves into the influence of public sentiment.

Authority, again, may be given to some person or body of persons, and preferably to the Courts, to adjudicate upon the constitutionality of legislative acts, and treat them as void if they are inconsistent with the letter or the spirit of the constitution. This system attempts not so much to prevent unconstitutional legislation as to render it harmless through the

tervention of the tribunals, and rests at bottom on the authority of the judges.

This general account of the two methods by which it may be attempted to secure the rigidity of a constitution is hardly intelligible without further illustration. Its meaning may be best understood by a comparison between the different policies in regard to the legislature pursued by two different classes of constitutionalists.

Safeguards provided by continental constitutionalists.

French constitution-makers and their continental followers have, as we have seen, always attached vital importance to the distinction between fundamental and other laws, and therefore have constantly created legislative assemblies which possessed "legislative" without possessing "constituent" powers. French statesmen have therefore been forced to devise means for keeping the ordinary legislature within its appropriate sphere. Their mode of procedure has been marked by a certain uniformity; they have declared on the face of the constitution the exact limits imposed upon the authority of the legislature; they have laid down as articles of the constitution whole bodies of maxims intended to guide and control the course of legislation: they have provided for the creation, by special methods and under special conditions, of a constituent body which alone should be entitled to revise the constitution. They have, in short, directed their attention to restraining the ordinary legislature from attempting any inroad upon the fundamental laws of the state; but they have in general trusted to public sentiment,[1]

[1] "Aucun des pouvoirs institués par la constitution n'a le droit "de la changer dans son ensemble ni dans ses parties, sauf les réformes

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or at any rate to political considerations, for inducing the legislature to respect the restraints imposed on its authority, and have usually omitted to provide machinery for annulling unconstitutional enactments, or for rendering them of no effect.

French Revolutionary constitutions.

These traits of French constitutionalism are specially noticeable in the three earliest of French political experiments. The Monarchical constitution of 1791, the Democratic constitution of 1793, the Directorial constitution of 1795 exhibit, under all their diversities, two features in common.[1] They each, on the one hand, confine the power of the legislature within very narrow limits indeed; under the Directory, for instance, the legislative body could not itself change any one of the 377 articles of the constitution, and the provisions for creating a constituent assembly were so framed that not the very least alteration in any of these articles could have been carried out within a period of less than nine years.[2] None of these

" qui pourront y être faites par la voie de la révision, conformément " aux dispositions du titre VII ci-dessus.

" L'Assemblée nationale constituante en remet le dépôt à la " fidélité du Corps législatif, du Roi et des juges, à la vigilance des " pères de famille, aux épouses et aux mères, à l'affection des jeunes " citoyens, au courage de tous les Français."—Constitution de 1791, Tit. vii. Art. 8.

These are the terms in which the National Assembly entrusts the Constitution of 1791 to the guardianship of the nation. It is just possible, though not likely, that the reference to the judges is intended to contain a hint that the Courts should annul or treat as void unconstitutional laws. Under the Constitution of the Year VIII. the senate had authority to annul unconstitutional laws. But this was rather a veto on what in England we should call Bills than a power to make void laws duly enacted. See Constitution of Year VIII. Tit. ii. Arts. 20, 28, Hélie, *Les Constitutions de la France*, 579.

[1] See Appendix, Note 1, Rigidity of French Constitutions.

[2] See Constitution of 1795, Tit. xiii. Art. 338, Hélie, *Les Constitutions de la France*, p. 463.

constitutions, on the other hand, contain a hint as to the mode in which a law is to be treated which is alleged to violate the constitution. Their framers indeed hardly seem to have recognised the fact that enactments of the legislature might, without being in so many words opposed to the constitution, yet be of dubious constitutionality, and that some means would be needed for determining whether a given law was or was not in opposition to the principles of the constitution.

Existing Republican constitution.

These characteristics of the revolutionary constitutions have been repeated in the works of later French constitutionalists. Under the present French Republic there exist a certain number of laws (not it is true a very large number), which the Parliament cannot change; and what is perhaps of more consequence, the so-called Congress[1] could at any time increase the number of fundamental laws, and thereby greatly decrease the authority of future Parliaments. The constitution however contains no article providing against the possibility of an ordinary Parliament carrying through legislation greatly in excess of its constitutional powers. Any one in fact who bears in mind the respect paid in France from the time of the Revolution onwards to the legislation of *de facto* governments and the traditions of the French judicature, will assume with confidence that an enactment passed through the Chambers, promulgated by the President, and published in the *Bulletin des Lois*, will be held valid by every tribunal throughout the Republic.

[1] The term is used by French writers, but does not appear in the *Lois Constitutionnelles*, and one would rather gather that the proper title for a so-called Congress is *L'Assemblée Nationale*.

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Are the articles of continental constitutions "laws"?

This curious result therefore ensues. The restrictions placed on the action of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the Courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution and from the resulting support of public opinion. What is true of the constitution of France applies with more or less force to other polities which have been formed under the influence of French ideas. The Belgian constitution, for example, restricts the action of the Parliament no less than does the Republican constitution of France. But it is at least doubtful whether Belgian constitutionalists have provided any means whatever for invalidating laws which diminish or do away with the rights (*e. g.* the right of freedom of speech), "guaranteed" to Belgian citizens. The jurists of Belgium maintain, in theory at least, that an Act of Parliament opposed to any article of the constitution ought to be treated by the Courts as void. But during the fifty-eight years of Belgian independence, no tribunal, it is said, has ever pronounced judgment upon the constitutionality of an Act of Parliament. This shows, it may be said, that the Parliament has respected the constitution, and certainly affords some evidence that, under favourable circumstances, formal declarations of rights may, from their influence on popular feeling, possess greater weight than is generally attributed to them in England; but it also suggests the notion that in Belgium, as in France, the restrictions on Parliamentary authority

are supported mainly by moral or political sentiment, and are at bottom rather constitutional understandings than laws. Chapter II.

To an English critic, indeed, the attitude of continental and especially of revolutionary statesmen towards the ordinary legislature bears an air of paradox. They seem to be almost equally afraid of leaving the authority of the ordinary legislature unfettered, and of taking the steps by which the legislature may be prevented from breaking through the bonds imposed upon its power. The explanation of this apparent inconsistency is to be found in two sentiments which have influenced French constitution-makers from the very outbreak of the Revolution—an over-estimate of the effect to be produced by general declarations of rights, and a settled jealousy of any intervention by the judges in the sphere of politics.[1] We shall see, in a later chapter, that the public law of France is radically influenced by the belief, almost universal among Frenchmen, that the Courts must not be allowed to interfere in any way whatever with matters of state, or indeed with anything affecting the machinery of government.[2]

Safeguards provided by founders of United States.

The authors of the American constitution (together with their Swiss imitators) have, for reasons that will appear in my next chapter, been even more anxious than French statesmen to limit the authority of every legislative body throughout the Republic. They have further shared the faith of continental politicians in the value possessed by general declara-

[1] De Tocqueville, *Œuvres Complètes*, i. pp. 167, 168.

[2] See chap. xii.

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tions of rights.* But they have, unlike French constitution-makers, directed their attention, not so much to preventing Congress and other legislatures from making laws in excess of their powers, as to the invention of means by which the effect of unconstitutional laws may be nullified; and this result they have achieved by making it the duty of every judge throughout the Union to treat as void any enactment which violates the constitution, and thus have given to the restrictions contained in the constitution on the legislative authority either of Congress or the State legislatures the character of real laws, that is, of rules enforced by the Courts. This system, which makes the judges the guardians of the constitution, provides the only adequate safeguard which has hitherto been invented against unconstitutional legislation.

CHAPTER III

PARLIAMENTARY SOVEREIGNTY AND FEDERALISM

Subject.

My present aim is to illustrate the nature of Parliamentary sovereignty as it exists in England, by a comparison with the system of government known as Federalism as it exists in several parts of the civilised world, and especially in the United States of America.[1]

Federalism best understood by studying constitution of United States.

There are indeed to be found at the present time three other noteworthy examples of federal government—the Swiss Confederation, the Dominion of Canada, and the German Empire. But while from a study of the institutions of each of these states one may draw illustrations which throw light on our subject, it will be best to keep our attention throughout this chapter fixed mainly on the institutions of the great American Republic. And this for two reasons. The Union, in the first place, presents the most completely developed type of federalism. All the features which mark that scheme of government, and above all the control of the legislature

[1] On the whole subject of American Federalism the reader should consult Mr. Bryce's *American Commonwealth*, and with a view to matters treated of in this chapter should read with special care chaps. i. to iv. and chaps. xxii. to xxxv.

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by the Courts, are there exhibited in their most salient and perfect form; the Swiss Confederation, moreover, and the Dominion of Canada, are copied from the American model, whilst the constitution of the German Empire is too full of anomalies, springing both from historical and from temporary causes, to be taken as a fair representative of any known form of government. The Constitution of the United States, in the second place, holds a very peculiar relation towards the institutions of England. In the principle of the distribution of powers which determines its form, the Constitution of the United States is the exact opposite of the English constitution, the very essence of which is, as I hope I have now made clear, the unlimited authority of Parliament. But while the formal differences between the constitution of the American Republic and the constitution of the English monarchy are, looked at from one point of view, immense, the institutions of America are in their spirit little else than a gigantic development of the ideas which lie at the basis of the political and legal institutions of England. The principle, in short, which gives its form to our system of government is (to use a foreign but convenient expression) "unitarianism," or the habitual exercise of supreme legislative authority by one central power, which in the particular case is the British Parliament. The principle which, on the other hand, shapes every part of the American polity, is that distribution of limited, executive, legislative, and judicial authority among bodies each co-ordinate with and independent of the other which, we shall in a moment see, is essential to the federal form of government. The contrast there-

fore between the two polities is seen in its most salient form, and the results of this difference are made all the more visible because in every other respect the institutions of the English people on each side the Atlantic rest upon the same notions of law, of justice, and of the relation between the rights of individuals and the rights of the government, or the state.

We shall best understand the nature of federalism and the points in which a federal constitution stands in contrast with the Parliamentary constitution of England if we note, first, the conditions essential to the existence of a federal state and the aim with which such a state is formed; secondly, the essential features of a federal union; and lastly, certain characteristics of federalism which result from its very nature, and form points of comparison, or contrast, between a federal polity and a system of Parliamentary sovereignty.

Conditions and aim of federalism.

A federal state requires for its formation two ions.[1]

Countries capable of union.

re must exist, in the first place, a body of such as the Cantons of Switzerland, the America, or the Provinces of Canada, so ted by locality, by history, by race, or be capable of bearing, in the eyes of , an impress of common nationality. e generally found (if we appeal to

ed States see Story, *Commentaries on the Constitution of* s (4th ed.), and Bryce, *American Commonwealth*.
see the British North America Act, 1867, 30 Vict. c. 3; *iamentary Procedure and Practice in the Dominion of Canada*.
erland see *Constitution Fédérale de la Confédération Suisse du* ; Blumer, *Handbuch des Schweizerischen Bundesstaatsrechtes*; *effentliche Recht der Schweizerischen Eidgenossenschaft*; and dams's *Swiss Confederation*.

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experience) that lands which now form part of a federal state were at some stage of their existence bound together by close alliance or by subjection to a common sovereign. It were going further than facts warrant to assert that this earlier connection is essential to the formation of a federal state. But it is certain that where federalism flourishes it is in general the slowly-matured fruit of some earlier and looser connection.

Existence of federal sentiment.

A second condition absolutely essential to the founding of a federal system is the existence of a very peculiar state of sentiment among the inhabitants of the countries which it is proposed to unite. They must desire union, and must not desire unity. If there be no desire to unite, there is clearly no basis for federalism; the wild scheme entertained (it is said) under the Commonwealth of forming a union between the English Republic and the United Provinces was one of those dreams which may have the imagination of politicians but can never be transformed into fact. If, on the other hand, the desire for unity, the wish will naturally satisfaction, not under a federal, but unitarian constitution; the experience of Scotland in the eighteenth and of Italy in the nineteenth century sho national feeling or the sense of co may be too strong to allow of that union and separation which is the federalism. The phase of sentiment, in forms a necessary condition for the form federal state is that the people of the prop should wish to form for many purposes

nation, yet should not wish to surrender the individual existence of each man's State or Canton. We may perhaps go a little farther, and say, that a federal government will hardly be formed unless many of the inhabitants of the separate States feel stronger allegiance to their own State than to the federal state represented by the common government. This was certainly the case in America towards the end of the last century, and in Switzerland at the middle of the present century. In 1787 a Virginian or a citizen of Massachusetts felt more attachment to Virginia or to Massachusetts than to the body of the confederated States. In 1848 the citizens of Lucerne felt far keener loyalty to their Canton than to the confederacy, and the same thing, no doubt, held true in a less degree of the men of Berne or of Zurich. The sentiment therefore which creates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings which are to a certain extent inconsistent—the desire for national unity and the determination to maintain the independence of each man's separate State. The aim of federalism is to give effect as far as possible to both these sentiments.

The aim of federalism.

A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of "state rights." The end aimed at fixes the essential character of federalism. For the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers[1] of

[1] See Appendix, Note 2, Division of Powers in Federal States.

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sovereignty are elaborately divided between the common or national government and the separate states. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several States. The preamble to the Constitution of the United States recites that "We, the people of the United "States, in order to form a more perfect union, "establish justice, ensure domestic tranquillity, pro- "vide for the common defence, promote the general "welfare, and secure the blessings of liberty to our- "selves and our posterity, do ordain and establish this "Constitution for the United States of America." The tenth amendment enacts that "the powers not "delegated to the United States by the Constitution "nor prohibited by it to the States are reserved to the "States respectively or to the people." These two statements, which are reproduced with slight alteration in the constitution of the Swiss Confederation,[1] point out the aim and lay down the fundamental idea of federalism.

Essential characteristics of federalism. United States.

From the notion that national unity can be reconciled with state independence by a division of powers under a common constitution between the nation on the one hand and the individual States on the other, flow the three leading characteristics of federalism,—the supremacy of the constitution—the distribution among bodies with limited and co-ordinate authority

[1] *Constitution Fédérale*, Preamble, and art. 3.

of the different powers of government—the authority of the Courts to act as interpreters of the constitution.

Supremacy of constitution.

A federal state derives its existence from the constitution, just as a corporation derives its existence from the grant by which it is created. Hence, every power, executive, legislative, or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution. Neither the President of the United States nor the Houses of Congress, nor the Governor of Massachusetts, nor the Legislature or General Court of Massachusetts, can legally exercise a single power which is inconsistent with the articles of the Constitution. This doctrine of the supremacy of the constitution is familiar to every American, but in England even trained lawyers find a difficulty in following it out to its legitimate consequences. The difficulty arises from the fact that under the English constitution no principle is recognised which bears any real resemblance to the doctrine (essential to federalism) that the Constitution constitutes the "supreme law of the land."[1] In England we have laws which may be called fundamental[2] or constitutional because they deal with important principles (as, for example, the descent of the Crown or the terms of union with Scotland) lying at the basis of our institutions, but with us there is no such thing as a supreme law, or law which tests the validity of other laws. There are indeed important statutes,

[1] See Constitution of United States, art. 6, cl. 2.

[2] The expression "fundamental laws of England" became current during the controversy as to the payment of ship-money (1635). See Gardiner, *History of England*, viii. pp. 84, 85.

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such as the Act embodying the Treaty of Union with Scotland, with which it would be political madness to tamper gratuitously; there are utterly unimportant statutes, such, for example, as the Dentists' Act, 1878, which may be repealed or modified at the pleasure or caprice of Parliament; but neither the Act of Union with Scotland nor the Dentists' Act, 1878, has more claim than the other to be considered a supreme law. Each embodies the will of the sovereign legislative power; each can be legally altered or repealed by Parliament; neither tests the validity of the other. Should the Dentists' Act, 1878, unfortunately contravene the terms of the Act of Union, the Act of Union would be *pro tanto* repealed, but no judge would dream of maintaining that the Dentists' Act, 1878, was thereby rendered invalid or unconstitutional. The one fundamental dogma of English constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament. But this dogma is incompatible with the existence of a fundamental compact, the provisions of which control every authority existing under the constitution.[1]

Consequences.

In the supremacy of the constitution are involved three consequences:—

Written constitution.

The constitution must almost necessarily be a "written" constitution.

The foundations of a federal state are a complicated contract. This compact contains a variety of terms which have been agreed to, and generally after mature deliberation, by the States which make up the confederacy. To base an arrangement of this kind

[1] Compare especially Kent, *Commentaries*, i. pp. 447-449.

upon understandings or conventions would be certain to generate misunderstandings and disagreements. The articles of the treaty, or in other words of the constitution, must therefore be reduced to writing. The constitution must be a written document, and, if possible, a written document of which the terms are open to no misapprehension. The founders of the American Union left at least one great question unsettled. This gap in the Constitution gave an opening to the dispute which was the plea, if not the justification, for the War of Secession.[1]

Rigid constitution.

The constitution must be what I have termed a "rigid"[2] or "inexpansive" constitution.

The law of the constitution must be either legally immutable, or else capable of being changed only by some authority above and beyond the ordinary legislative bodies, whether federal or state legislatures, existing under the constitution.

In spite of the doctrine enunciated by some jurists that in every country there must be found some person or body legally capable of changing every institution thereof, it is hard to see why it should be held inconceivable[3] that the founders of a polity

[1] No doubt it is conceivable that a federation might grow up by the force of custom, and under agreements between different States which were not reduced into writing, and it appears to be questionable how far the Achæan League was bound together by anything equivalent to a written constitution. It is, however, in the highest degree improbable, even if it be not practically impossible, that in modern times a federal state could be formed without the framing of some document which, whatever the name by which it is called, would be in reality a written constitution, regulating the rights and duties of the federal government and the States composing the Federation.

[2] See pp. 118-120, *ante*.

[3] Eminent American lawyers, whose opinion is entitled to the highest respect, maintain that under the Constitution there exists no person, or body of persons, possessed of legal sovereignty, in the sense

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should have deliberately omitted to provide any means for lawfully changing its bases. Such an omission would not be unnatural on the part of the authors of a federal union, since one main object of the States entering into the compact is to prevent further encroachments upon their several state rights; and in the fifth article of the United States Constitution may still be read the record of an attempt to give to some of its provisions temporary immutability. The question, however, whether a federal constitution necessarily involves the existence of some ultimate sovereign power authorised to amend or alter its terms is of merely speculative interest, for under existing federal governments the constitution will be found to provide the means for its own improvement. It is, at any rate, certain that whenever the founders of a federal government hold the maintenance of a federal system to be of primary importance, supreme legislative power cannot be safely vested in any ordinary legislature acting under the constitution.[1]

given by Austin to that term, and it is difficult to see that this opinion involves any absurdity. Compare Constitution of United States, art. 5. It would appear further that certain rights reserved under the Constitution of the German Empire to particular States cannot under the Constitution be taken away from a State without its assent. (See *Reichsverfassung*, art. 78.) The truth is that a Federal Constitution partakes of the nature of a treaty, and it is quite conceivable that the authors of the Constitution may intend to provide no constitutional means of changing its terms, except the assent of all the parties to the treaty.

[1] Under the Constitution of the German Empire the Imperial legislative body can amend the Constitution. But the character of the Federal Council (*Bundesrath*) gives ample security for the protection of State rights. No change in the Constitution can be effected which is opposed by fourteen votes in the Federal Council. This gives a veto on change to any one of three States and to combinations of minor States. The extent to which national sentiment and State patriotism respectively predominate under a federal system may be conjectured

For so to vest legislative sovereignty would be inconsistent with the aim of federalism, namely, the permanent division between the spheres of the national government and of the several States. If Congress could legally change the Constitution, New York and Massachusetts would have no legal guarantee for the amount of independence reserved to them under the Constitution, and would be as subject to the sovereign power of Congress as is Scotland to the sovereignty of Parliament; the Union would cease to be a federal state, and would become a unitarian republic. If, on the other hand, the legislature of South Carolina could of its own will amend the Constitution, the authority of the central government would (from a legal point of view) be illusory; the United States would sink from a nation into a collection of independent countries united by the bond of a more or less permanent alliance. Hence the power of amending the Constitution has been placed, so to speak, outside the Constitution, and one may say, with sufficient accuracy for our present purpose, that the legal sovereignty of the United States resides in the majority of a body constituted by the joint action of three-fourths of the several States at any time belonging to the Union.[1] Now from the necessity for placing ultimate legislative authority in some body outside the Constitution a remarkable consequence ensues. Under a federal as under a unitarian system there exists a sovereign power, but the sovereign is in a federal state a despot hard to rouse. He is not,

from the nature of the authority which has the right to modify the Constitution. See Appendix, Note 2, Division of Powers in Federal States.

[1] See Constitution of United States, art. 5.

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like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable.

Every legislature under federal constitution is a subordinate law-making body.

Every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are of the nature of bye-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority.

There is an apparent absurdity[1] in comparing the legislature of the United States to an English railway company or a school-board, but the comparison is just. Congress can, within the limits of its legal powers, pass laws which bind every man throughout the United States. The Great Eastern Railway Company can, in like manner, pass laws which bind every man throughout the British dominions. A law passed by Congress which is in excess of its legal powers, as contravening the Constitution, is invalid; a law passed by the Great Eastern Railway Company in excess of the powers given by Act of Parliament, or, in other words, by the legal constitution of the company, is also invalid; a law passed by Congress is called an "Act" of Congress, and if *ultra vires* is described

[1] See p. 87, note, *ante*.

s "unconstitutional;" a law passed by the Great Eastern Railway Company is called a "bye-law," nd if *ultra vires* is called, not "unconstitutional," ut "invalid." Differences however of words must not conceal from us essential similarity in things. Acts of Congress, or of the Legislative Assembly of New York or of Massachusetts, are at bottom simply "bye-laws," depending for their validity upon their being within the powers given to Congress or to the state legislatures by the Constitution. The bye-laws of the Great Eastern Railway Company, imposing fines upon passengers who travel over their line without a ticket, are laws, but they are laws depending for their validity upon their being within the powers conferred upon the Company by Act of Parliament, *i.e.* by the Company's constitution. Congress and the Great Eastern Railway Company are in truth each of them nothing more than subordinate law-making bodies. Their power differs not in degree, but in kind, from the authority of the sovereign Parliament of the United Kingdom.[1]

Distribution of powers.

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate States, and as it is not intended that the central government should have the opportunity of encroaching upon the

[1] See as to bye-laws made by municipal corporations, and the dependence of their validity upon the powers conferred upon the corporation: *Johnson* v. *Mayor of Croydon*, 16 Q. B. D. 708; *Reg.* v. *Powell*, 51 L. T. 92; *Munro* v. *Watson*, 57 L. T. 366. See Bryce, *American Commonwealth*, i. pp. 327-329.

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rights retained by the States, its sphere of actio necessarily becomes the object of rigorous definitio The Constitution, for instance, of the United State delegates special and closely-defined powers to the executive, to the legislature, and to the judiciary of the Union, or in effect to the Union itself, whilst it provides that the powers "not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."[1]

Division of powers carried in fact beyond necessary limit.

This is all the amount of division which is essential to a federal constitution. But the principle of definition and limitation of powers harmonises so well with the federal spirit that it is generally carried much farther than is dictated by the mere logic of the constitution. Thus the authority assigned to the United States under the Constitution is not concentrated in any single official or body of officials. The President has definite rights, upon which neither Congress nor the judicial department can encroach. Congress has a limited (indeed a very limited) power of legislation, for it can make laws upon eighteen topics only; but within its own sphere it is independent both of the President and of the Federal

[1] Constitution of United States, Amendments, art. 10. Compare provisions of a similar character in the Swiss Constitution, *Constitution Fédérale*, art. 3, and in the Constitution of the Canadian Dominion, British North America Act, 1867, secs. 91, 92.

There exists, however, one marked distinction in principle between the Constitution of the United States and the Constitution of the Canadian Dominion. The Constitution of the United States in substance reserves to the separate States all powers not expressly conferred upon the national government. The Canadian Constitution in substance confers upon the Dominion government all powers not assigned exclusively to the Provinces. In this matter the Swiss Constitution follows that of the United States.

Courts. So, lastly, the judiciary have their own powers. They stand on a level both with the President and with Congress, and their authority (being directly derived from the constitution) cannot, without a distinct violation of law, be trenched upon either by the executive or by the legislature. Where, further, States are federally united, certain principles of policy or of justice must be enforced upon the whole confederated body as well as upon the separate parts thereof, and the very inflexibility of the constitution tempts legislators to place among constitutional articles maxims which (though not in their nature constitutional) have special claims upon respect and observance. Hence spring additional restrictions on the power both of the federation and of the separate States. The United States Constitution prohibits [illegible] to Congress[1] and to the separate States[2] the passing of a bill of attainder or an *ex post facto* law, the granting of any title of nobility, or the laying of any tax on articles exported from any State,[3] enjoins that full faith shall be given to the public acts and judicial proceedings of every other State, hinders any State from passing any law impairing the obligation of contracts,[4] and prevents every State from entering into any treaty, alliance, or confederation; thus it provides that the elementary principles of justice, freedom of trade, and the rights of individual property shall be absolutely respected throughout the length and breadth of the Union. It further ensures that the right of the people to keep and bear arms

[1] Constitution of United States, art. 1, sec. 9.
[2] *Ibid.*, art. 1, sec. 10.
[3] *Ibid.*, art. 1, sec. 9.
[4] *Ibid.*, art. 1, sec. 10.

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shall not be infringed, while it also provides that no member can be expelled from either House of Congress without the concurrence of two-thirds of the House. Other federal constitutions go far beyond that of the United States in inscribing among constitutional articles either principles or petty rules which are supposed to have a claim of legal sanctity; the Swiss Constitution teems with "guaranteed" rights.

Nothing, however, would appear to an English critic to afford so striking an example of the connection between federalism and the "limitation of powers" as the way in which the principles of the federal Constitution pervade in America the constitutions of the separate States. In no case does the legislature of any one State possess all the powers of "state sovereignty" left to the States by the Constitution of the Republic, and every state legislature is subordinated to the constitution of the State. The ordinary legislature of New York or Massachusetts can no more change the state constitution than it can alter the Constitution of the United States itself; and, though the topic cannot be worked out here in detail, it may safely be asserted that state government throughout the Union is formed upon the federal model, and (what is noteworthy) that state constitutions have carried much further than the Constitution of the Republic the tendency to clothe with constitutional immutability any rules which strike the people as important. Illinois has embodied, among fundamental laws, regulations as to elevators.[1]

[1] See *Munn* v. *Illinois*, 4 Otto, 113.

But here, as in other cases, there is great difficulty in distinguishing cause and effect. If a federal form of government has affected, as it probably has, the constitutions of the separate States, it can hardly be doubted that features originally existing in the state constitutions have been reproduced in the Constitution of the Union; and, as we shall see in a moment, the most characteristic institution of the United States, the Federal Court, appears to have been suggested at least to the founders of the Republic, by the relation which before 1789 already existed between the state tribunals and the state legislatures.[1]

Division of powers distinguishes federal from unitarian system of government.

The tendency of federalism to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities is specially noticeable, because it forms the essential distinction between a federal system such as that of America or Switzerland, and a unitarian system of government such as that which exists in England or Russia. We talk indeed of the English constitution as resting on a balance of powers,

[1] European critics of American federalism have, as has been well remarked by an eminent French writer, paid in general too little attention to the working and effect of the state constitutions, and have overlooked the great importance of the action of the state legislatures. See Boutmy, *Études de Droit Constitutionnel* (1st ed.), pp. 105-113.

"It has been truly said that nearly every provision of the Federal "Constitution that has worked well is one borrowed from or suggested "by some State Constitution; nearly every provision that has worked "badly is one which the Convention, for want of a precedent, was "obliged to devise for itself."—Bryce, *American Commonwealth*, i. p. 43. One capital merit of Mr. Bryce's book is that it for the first time reveals, even to those who had already studied American institutions, the extent to which the main features of the Constitution of the United States were suggested to its authors by the characteristics of the State governments.

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and as maintaining a division between the executive, the legislative, and the judicial bodies. These expressions have a real meaning. But they have quite a different significance as applied to England from the sense which they bear as applied to the United States. All the power of the English state is concentrated in the Imperial Parliament, and all departments of government are legally subject to Parliamentary despotism. Our judges are independent, in the sense of holding their office by a permanent tenure, and of being raised above the direct influence of the Crown or the Ministry; but the judicial department does not pretend to stand on a level with Parliament; its functions might be modified at any time by an Act of Parliament; and such a statute would be no violation of the law. The Federal Judiciary, on the other hand, are co-ordinate with the President and with Congress, and cannot without a revolution be deprived of a single right by President or Congress. So, again, the executive and the legislature are with us distinct bodies, but they are not distinct in the sense in which the President is distinct from and independent of the Houses of Congress. The House of Commons interferes with administrative matters, and the Ministry are in truth placed and kept in office by the House. A modern Cabinet would not hold power for a week if censured by a newly elected House of Commons. An American President may retain his post and exercise his very important functions even though his bitterest opponents command majorities both in the Senate and in the House of Representatives. Unitarianism, in short, means the concentration of the strength of the

state in the hands of one visible sovereign power, be that power Parliament or Czar. Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.

Authority of Courts.

Whenever there exists, as in Belgium or in France, an inflexible constitution the articles of which cannot be amended by the ordinary legislature, the difficulty has to be met of guarding against legislation inconsistent with the constitution. As Belgian and French statesmen have created no machinery for the attainment of this object, we may conclude that they considered respect for the constitution to be sufficiently secured by moral or political sanctions, and treated the limitations placed on the power of Parliament rather as maxims of policy than as true laws. During a period, at any rate of more than fifty years, no Belgian judge has (it is said) ever pronounced a Parliamentary enactment unconstitutional. No French tribunal, as has been already pointed out, would hold itself at liberty to disregard an enactment, however unconstitutional, passed by the National Assembly, inserted in the *Bulletin des Lois*, and supported by the force of the government; and French statesmen may well have thought, as De Tocqueville certainly did think, that in France possible Parliamentary invasions of the constitution were a less evil than the participation of the judges in political conflicts. France, in short, and Belgium being governed under unitarian constitutions, the non-sovereign character of the legislature is in each case an accident, not an essential property of their polity. Under a federal system it is otherwise. The

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legal supremacy of the constitution is essential to the existence of the state; the glory of the founders of the United States is to have devised or adopted arrangements under which the Constitution became in reality as well as name the supreme law of the land. This end they attained by adherence to a very obvious principle, and by the invention of appropriate machinery for carrying this principle into effect.

How authority of the Courts is exerted.

The principle is clearly expressed in the Constitution of the United States. "The Constitution," runs article 6, "and the laws of the United States which "shall be made in pursuance thereof . . . shall be the "supreme law of the land, and the judges in every "State shall be bound thereby, anything in the consti- "tution or laws of any State to the contrary notwith- "standing."[1] The import of these expressions is unmistakable. "Every Act of Congress," writes Chancellor Kent, "and every Act of the legislatures "of the States, and every part of the constitution of "any State, which are repugnant to the Constitution "of the United States, are necessarily void." This is a "clear and settled principle of [our] constitutional "jurisprudence."[2] The legal duty therefore of every judge, whether he act as a judge of the State of New York or as a judge of the Supreme Court of the United States, is clear. He is bound to treat as void every legislative act, whether proceeding from Congress or from the state legislatures, which is inconsistent with the Constitution of the United States. His duty is as clear as that of an English judge called upon to determine the validity of a bye-law

[1] Constitution of United States, art. 6.

[2] Kent, *Commentaries*, i. (12th ed.), p. 314, and conf. *Ibid.*, p. 449.

made by the Great Eastern or any other Railway Company. The American judge must in giving judgment obey the terms of the Constitution, just as his English brother must in giving judgment obey every Act of Parliament bearing on the case.

Supremacy of constitution secured by creation of Supreme Court.

To have laid down the principle with distinctness is much, but the great problem was how to ensure that the principle should be obeyed; for there existed a danger that judges depending on the federal government should wrest the Constitution in favour of the central power, and that judges created by the States should wrest it in favour of State rights or interests. This problem has been solved by the creation of the Supreme Court and of the Federal Judiciary.

Nature and action of Supreme Court.

Of the nature and position of the Supreme Court itself thus much alone need for our present purpose be noted. The Court derives its existence from the Constitution, and stands therefore on an equality with the President and with Congress; the members thereof (in common with every judge of the Federal Judiciary) hold their places during good behaviour, at salaries which cannot be diminished during a judge's tenure of office.[1] The Supreme Court stands at the head of the whole federal judicial department, which, extending by its subordinate Courts throughout the Union, can execute its judgments through its own officers without requiring the aid of state officials. The Supreme Court, though it has a certain amount of original jurisdiction, derives its importance from its appellate character; it is on every matter which concerns the interpretation of the Constitution a supreme and final Court of Appeal from the decision of every

[1] Constitution of United States, art. 3, secs. 1, 2.

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Court (whether a Federal Court or a State Court) throughout the Union. It is in fact the final interpreter of the Constitution, and therefore has authority to pronounce finally as a Court of Appeal whether a law passed either by Congress or by the legislature of a State, *e.g.* New York, is or is not constitutional. To understand the position of the Supreme Court we must bear in mind that there exist throughout the Union two classes of Courts in which proceedings can be commenced, namely, the subordinate federal Courts deriving their authority from the Constitution, and the state Courts, *e.g.* of New York or Massachusetts, created by and existing under the state constitutions; and that the jurisdiction of the federal judiciary and the state judiciary is in many cases concurrent, for though the jurisdiction of the federal Courts is mainly confined to cases arising under the Constitution and laws of the United States, it is also occasionally dependent upon the character of the parties, and though there are cases with which no state Court can deal, such a Court may often entertain cases which might be brought in a federal Court, and constantly has to consider the effect of the Constitution on the validity either of a law passed by Congress or of state legislation. That the Supreme Court should be a Court of Appeal from the decision of the subordinate federal tribunals is a matter which excites no surprise. The point to be noted is that it is also a Court of Appeal from decisions of the Supreme Court of any State, *e.g.* New York, which turn upon or interpret the articles of the Constitution or Acts of Congress. The particular cases in which a party aggrieved by the decision of a state Court has a right of appeal to

the Supreme Court of the United States are regulated by an Act of Congress of 24th September 1789, the twenty-fifth section of which provides that "a final "judgment or decree, in any suit in the highest court "of law or equity of a State, may be brought up on "error in point of law, to the Supreme Court of the "United States, provided the validity of a treaty, or "statute of, or authority exercised under the United "States, was drawn in question in the state court, and "the decision was against that validity; or provided "the validity of any state authority was drawn in "question, on the ground of its being repugnant to the "Constitution, treaties, or laws of the United States, "and the decision was in favour of its validity; or pro-"vided the construction of any clause of the Constitu-"tion or of a treaty, or statute of, or commission held "under the United States, was drawn in question, and "the decision was against the title, right, privilege, "or exemption, specially claimed under the authority "of the Union."[1] Strip this enactment of its technicalities and it comes to this. A party to a case in the highest Court, say of New York, who bases his claim or defence upon an article in the Constitution or law made under it, stands in this position: If judgment be in his favour there is no further appeal; if judgment goes against him, he has a right of appeal to the Supreme Court of the United States. Any lawyer can see at a glance how well devised is the arrangement to encourage state Courts in the performance of their duty as guardians of the Constitution, and further that the Supreme Court thereby becomes the ultimate arbiter of all matters affecting the Constitution.

[1] Kent, *Commentaries*, i. (12th ed.), pp. 299, 300.

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Let no one for a moment fancy that the right of every Court, and ultimately of the Supreme Court, to pronounce on the constitutionality of legislation and on the rights possessed by different authorities under the Constitution is one rarely exercised, for it is in fact a right which is constantly exerted without exciting any more surprise on the part of the citizens of the Union than does in England a judgment of the Queen's Bench Division treating as invalid the bye-law of a railway company. The American tribunals have dealt with matters of supreme consequence; they have determined that Congress has the right to give priority to debts due to the United States,[1] can lawfully incorporate a bank,[2] has a general power to levy or collect taxes without any restraint, but subject to definite principles of uniformity prescribed by the Constitution; the tribunals have settled what is the power of Congress over the militia, who is the person who has a right to command it,[3] and that the power exercised by Congress during the War of Secession of issuing paper money was valid.[4] The Courts again have controlled the power of the separate States fully as vigorously as they have defined the authority of the United States. The judiciary have pronounced unconstitutional every *ex post facto* law, every law taxing even in the slightest degree articles exported from any State, and have again deprived of effect state laws impairing the obligation of contracts.

[1] Kent, *Commentaries*, i. (12th ed.), pp. 244-248.

[2] *Ibid.*, pp. 248-254. [3] *Ibid.*, pp. 262-266.

[4] Story, *Commentaries on the Constitution* (4th ed.), ii. secs. 1116, 1117. See *Hepburn* v. *Griswold*, 8 Wallace, 603, Dec. 1869, and *Knox* v. *Lee*, 12 Wallace, 457.

To the judiciary in short is due the maintenance of justice, the existence of internal free trade, and the general respect for the rights of property; whilst a recent decision shows that the Courts are prepared to uphold as consistent with the Constitution any laws which prohibit modes of using private property, which seem to the judges inconsistent with public interest.[1] The power moreover of the Courts which maintains the articles of the Constitution as the law of the land, and thereby keeps each authority within its proper sphere, is exerted with an ease and regularity which has astounded and perplexed continental critics. The explanation is that the judges of the United States control the action of the Constitution, but they perform purely judicial functions, since they never decide anything but the cases before them. It is natural to say that the Supreme Court pronounces Acts of Congress invalid, but in fact this is not so. The Court never pronounces any opinion whatever upon an Act of Congress. What the Court does do is simply to determine that in a given case *A* is or is not entitled to recover judgment against *X*; but in determining that case the Court may decide that an Act of Congress is not to be taken into account, since it is an Act beyond the constitutional powers of Congress.[2]

The true merit of the founders of the United States.

If any one thinks this is a distinction without a difference he shows great ignorance of politics, and does not understand how much the authority of a Court is increased by confining its action to purely

[1] *Munn* v. *Illinois*, 4 Otto, Rep. 113. See especially the Judgments of Marshall, C. J., collected in *the Writings of John Marshall upon the Federal Constitution* (1839).

[2] See chap. ii. pp. 90-94, *ante*.

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judicial business. But persons who, like De Tocqueville, have fully appreciated the wisdom of the statesmen who created the Union, have formed perhaps an exaggerated estimate of their originality. Their true merit was that they applied with extraordinary skill the notions which they had inherited from English law to the novel circumstances of the new republic. To any one imbued with the traditions of English procedure it must have seemed impossible to let a Court decide upon anything but the case before it. To any one who had inhabited a colony governed under a charter the effect of which on the validity of a colonial law was certainly liable to be considered by the Privy Council, there was nothing startling in empowering the judiciary to pronounce in given cases upon the constitutionality of Acts passed by assemblies whose powers were limited by the Constitution, just as the authority of the colonial legislatures was limited by charter or by Act of Parliament. To a French jurist, indeed, filled with the traditions of the French Parliaments, all this might well be incomprehensible, but an English lawyer can easily see that the fathers of the republic treated Acts of Congress as English Courts treat bye-laws, and in forming the Supreme Court may probably have had in mind the functions of the Privy Council. It is still more certain that they had before their eyes cases in which the tribunals of particular States had treated as unconstitutional, and therefore pronounced void, Acts of the state legislature which contravened the state constitution. The earliest case of declaring a law unconstitutional dates (it is said) from 1786, and took place in Rhode Island, which

was then, and continued till 1842, to be governed under the charter of Charles II. An Act of the legislature was declared unconstitutional by the Courts of North Carolina in 1787[1] and by the Courts of Virginia in 1788,[2] whilst the Constitution of the United States was not adopted till 1789, and *Marbury* v. *Madison*, the first case in which the Supreme Court dealt with the question of constitutionality, was decided in 1803.[3]

But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a constitution which should in strictness be "the law of the land," and in so doing created modern federalism. For the essential characteristics of federalism—the supremacy of the constitution — the distribution of powers — the authority of the judiciary — reappear, though no doubt with modifications, in every true federal state.

The Canadian Dominion.

Turn for a moment to the Canadian Dominion. The preamble to the British North America Act, 1867, asserts with official mendacity that the Provinces of the present Dominion have expressed their desire to be united into one Dominion "with a constitution similar in principle to that of the United *Kingdom*." If preambles were intended to express the truth, for the word "*Kingdom*" ought to have been substituted "*States*"; since it is clear that the Constitution of the

[1] Martin, 421. [2] 1 Va. Cas. 198.

[3] 1 Cranch, 137. For the facts as to the early action of the State Courts in declaring legislative enactments unconstitutional I am indebted, as for much other useful criticism, to my friend Professor Thayer, of Harvard University.

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Dominion is modelled on that of the Union. This is indeed denied, but in my judgment without adequate grounds, by competent Canadian critics. The differences between the institutions of the United States and of the Dominion are of course both considerable and noteworthy. But no one can study the provisions of the British North America Act, 1867, without seeing that its authors had the American Constitution constantly before their eyes, and that if Canada were an independent country it would be a Confederacy governed under a Constitution very similar to that of the United States. The Constitution is the law of the land; it cannot be changed (except within narrow limits allowed by the British North America Act, 1867) either by the Dominion Parliament[1] or by the Provincial Parliaments;[2] it can be altered only by the sovereign power of the British Parliament.[3] Nor does this arise from the Canadian Dominion being a dependency. Victoria is, like Canada, a colony, but the Victorian Parliament can with the assent of the Crown do what the Canadian Parliament cannot do—change the colonial constitution. Throughout the Dominion, therefore, the Constitution is in the strictest sense the immutable law of the land. Under this law again, you have, as you would expect, the distribution of

[1] See, however, British North America Act, 1867 (30 Vict. c. 3), s. 94, which gives the Dominion Parliament a limited power (when acting in conjunction with a Provincial legislature) of changing to a certain extent the provisions of the British North America Act, 1867.

[2] The legislatures of each Province have, nevertheless, authority to make laws for "the amendment from time to time, notwithstanding "anything" [in the British North America Act, 1867] "of the "Constitution of the Province, except as regards the office of Lieutenant "Governor." See British North America Act, 1867, s. 92.

[3] See for an example of an amendment of the Dominion Constitution by an Imperial statute, the Parliament of Canada Act, 1875.

powers among bodies of co-ordinate authority;[1] though undoubtedly the powers bestowed on the Dominion Government and Parliament are greater when compared with the powers reserved to the Provinces than are the powers which the Constitution of the United States gives to the federal government. In nothing is this more noticeable than in the authority given to[2] the Dominion Government to disallow Provincial Acts.[3]

This right was possibly given with a view to obviate altogether the necessity for invoking the law Courts as interpreters of the Constitution; the founders of the Confederation appear in fact to have believed that "the care taken to define the respective "powers of the several legislative bodies in the "Dominion would prevent any troublesome or danger-"ous conflict of authority arising between the central "and local governments."[4] The futility however of a hope grounded on a misconception of the nature of federalism is proved by the existence of two thick volumes of reports filled with cases on the constitutionality of legislative enactments, and by a long list of decisions as to the respective powers possessed by the Dominion and by the Provincial Parliaments—judgments given by the true Supreme Court of the Dominion, namely, the Judicial Committee of the Privy Council. In Canada, as in the United States, the Courts inevitably become the interpreters of the Constitution.

[1] British North America Act, 1867, secs. 91, 92.

[2] *Ibid.*, secs. 56, 90.

[3] Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, p. 76.

[4] *Ibid.*, p. 694.

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The Swiss Confederation.

Swiss federalism repeats, though with noteworthy variations, the essential traits of the federal polity as it exists across the Atlantic. The Constitution is the law of the land, and cannot be changed either by the federal or by the cantonal legislative bodies; the Constitution enforces a distribution of powers between the national government and the Cantons, and directly or indirectly defines and limits the power of every authority existing under it. The Common Government has in Switzerland, as in America, three organs — a Federal Legislature, a Federal Executive (*Bundesrath*), and a Federal Court (*Bundesgericht*).

Of the many interesting and instructive peculiarities which give to Swiss federalism an individual character, this is not the occasion to write in detail. It lies however within the scope of this chapter to note that the Constitution of the Confederation differs in two most important respects from that of the United States. It does not, in the first place, establish anything like the accurate division between the executive and the judicial departments of government which exists both in America and in Canada; the Executive exercises, under the name of "administrative law," many functions[1] of a judicial character, and thus, for example, deals with questions having reference to the rights of religious bodies.[2] The Federal Assembly is the final arbiter on all questions as to the respective jurisdiction of the Executive and of the Federal Court. The judges of that Court are elected by the Federal

[1] *Constitution Fédérale*, art. 113, *Loi*; 27 June 1874, art. 59; and Dubs, *Oeffentliche Recht*, ii. (2nd ed.), p. 90.

[2] See article on the Swiss Federal Court, by W. A. B. Coolidge, *Law Quarterly Review*, v. p. 166.

ssembly, they are occupied greatly with questions of ublic law (*Staatsrecht*), and so experienced a states- an as Dr. Dubs laments that the Federal Court ould possess jurisdiction in matters of private law.[1] hen to this is added that the judgments of the deral Court are executed by the government, it at ce becomes clear that, according to any English ndard, Swiss statesmanship has failed as distinctly American statesmanship has succeeded in keeping the judicial apart from the executive department of government, and that this failure constitutes a serious flaw in the Swiss Constitution. That Constitution, in the second place, does not in reality place the Federal Court on an absolute level with the Federal Assembly. In many cases that tribunal cannot ques- on the constitutionality of laws or decrees passed by e federal Parliament.[2] From this fact one might ppose that the Federal Assembly is (unlike Con- ess) a sovereign body, but this is not so. The reason hy all Acts of the Assembly are treated as con- itutional by the Federal Tribunal is that the onstitution itself almost precludes the possibility of encroachment upon its articles by the federal legislative body. No legal revision can take place without the assent both of a majority of Swiss citizens and of a majority of the Cantons, and an ordinary law duly passed by the Federal Assembly may be legally annulled by a popular veto. The authority of the Swiss Assembly nominally exceeds the authority of Congress, because in reality the Swiss legislative body is weaker than Congress. For while in each case

[1] *Constitution Fédérale*, art. 113, and Dubs, *Oeffentliche Recht*, ii. (2d ed.), pp. 92-95

[2] *Ibid.*

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there lies in the background a legislative soverei capable of controlling the action of the ordina legislature, the sovereign power is far more eas brought into play in Switzerland than in Ameri When the sovereign power can easily enforce its w it may trust to its own action for maintaining rights; when, as in America, the same power acts b rarely and with difficulty, the Courts naturally beco the guardians of the sovereign's will expressed in t articles of the Constitution.

Comparison between system of federalism and of parliamentary sovereignty.

Our survey from a legal point of view of the characteristics common to all federal governments forcibly suggests conclusions of more than merely legal interest, as to the comparative merits of federal government, and the system of Parliamentary sovereignty.

Weakness of federalism.

Federal government means weak government.[1] The distribution of all the powers of the st among co-ordinate authorities necessarily leads to result that no one authority can wield the same amo of power as under a unitarian constitution is possess by the sovereign. A scheme again of checks a balances in which the strength of the common gov- ernment is so to speak pitted against that of the state

[1] This weakness springs from two different causes: first, the division of powers between the central government and the States; secondly, the distribution of powers between the different members (*e.g.* the President and the Senate) of the national government. The first cause of weakness is inherent in the federal system; the second cause of weakness is not (logically at least) inherent in federalism. Under a federal constitution the whole authority of the national government might conceivably be lodged in one person or body, but we may feel almost certain that in practice the fears entertained by the separate States of encroachments by the central government on their State rights will prohibit such a concentration of authority.

governments leads, on the face of it, to a certain waste of energy. A federation therefore will always be at a disadvantage in a contest with unitarian states of equal resources. Nor does the experience either of the United States or of the Swiss confederation invalidate this conclusion. The Union is threatened by no powerful neighbours and needs no foreign policy. Circumstances unconnected with constitutional arrangements enables Switzerland to preserve her separate existence, though surrounded by powerful and at times hostile nations. The mutual jealousies moreover incident to federalism do visibly weaken the Swiss Republic. Thus, to take one example only, each member of the Executive must belong to a different canton.[1] But this rule may exclude from the government statesmen of high merit, and therefore diminish the resources of the state. A rule that each member of the Cabinet should be the native of a different county would appear to Englishmen palpably absurd. Yet this absurdity is forced upon Swiss politicians, and affords one among numerous instances in which the efficiency of the public service is sacrificed to the requirements of federal sentiment. Switzerland, moreover, is governed under a form of democratic federalism which tends towards unitarianism. Each revision increases the authority of the nation at the expense of cantonal independence. This is no doubt in part due to the desire to strengthen the nation against foreign attack. It is perhaps also due to another circumstance. Federalism, as it defines, and therefore limits, the powers of each department of the administration, is unfavourable to the

[1] *Constitution Fédérale*, art. 96.

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interference or to the activity of government. Hence a federal government can hardly render services to the nation by undertaking for the national benefit functions which may be performed by individuals. This may be a merit of the federal system; it is, however, a merit which does not commend itself to modern democrats, and no more curious instance can be found of the inconsistent currents of popular opinion which may at the same time pervade a nation or a generation than the coincidence in England of a vague admiration for federalism alongside with a far more decided feeling against the doctrines of so-called *laissez faire*. A system meant to maintain the *status quo* in politics is incompatible with schemes for wide social innovation.

Conservatism of federalism.

Federalism tends to produce conservatism.

This tendency is due to several causes. The constitution of a Federal state must, as we have seen, generally be not only a written but a rigid constitution, that is, a constitution which cannot be changed by any ordinary process of legislation. Now this essential rigidity of federal institutions is almost certain to impress on the minds of citizens the idea that any provision included in the constitution is immutable and, so to speak, sacred. The least observation of American politics shows how deeply the notion that the Constitution is something placed beyond the reach of amendment has impressed popular imagination. The difficulty of altering the Constitution produces conservative sentiment, and national conservatism doubles the difficulty of altering the Constitution. The House of Lords has lasted for centuries; the American Senate has existed for about

one hundred years, yet to abolish or alter the House of Lords would be a far easier matter than to modify the constitution of the Senate. To this one must add that a federal constitution always lays down general principles which, from being placed in the constitution, gradually come to command a superstitious reverence, and thus are in fact, though not in theory, protected from change or criticism. The principle that legislation ought not to impair obligation of contracts has governed the whole course of American opinion. Of the conservative effect of such a maxim when forming an article of the constitution we may form some measure by the following reflection. If any principle of the like kind had been recognised in England as legally binding on the Courts, the Irish Land Act would have been unconstitutional and void; the Irish Church Act, 1869, would, in great part at least, have been from a legal point of view so much waste paper, and there would have been great difficulty in legislating in the way in which the English Parliament has legislated for the reform of the Universities. One maxim only among those embodied in the Constitution of the United States would, that is to say, have been sufficient if adopted in England to have arrested the most vigorous efforts of recent Parliamentary legislation.

Legal spirit of federalism.

Federalism, lastly, means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people.

That in a confederation like the United States the Courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty is lodged in a body which rarely exerts its

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authority and has (so to speak) only a potential existence; no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but bye-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also the master of the constitution. Nothing puts in a stronger light the inevitable connection between federalism and the prominent position of the judicial body than the history of modern Switzerland. The statesmen of 1848 desired to give the *Bundesgericht* a far less authoritative position than is possessed by the American Supreme Court. They in effect made the Federal Assembly for most what it still is for some purposes, a final Court of Appeal. But the necessities of the case were too strong for Swiss statesmanship; the revision of 1874 greatly increased the power of the Federal Tribunal.

Dangers arising from position of judiciary.

From the fact that the judicial Bench supports under federal institutions the whole stress of the constitution, a special danger arises lest the judiciary should be unequal to the burden laid upon them. In no country has greater skill been expended on constituting an august and impressive national tribunal than in the United States. Moreover, as already pointed out, the guardianship of the Constitution is in America confided not only to the Supreme Court but to every judge throughout the land. Still it is manifest that even the Supreme Court can hardly

support the duties imposed upon it. No one can doubt that the varying decisions given in the legal-tender cases, or in the line of recent judgments of which *Munn* v. *Illinois* is a specimen, show that the most honest judges are after all only honest men, and when set to determine matters of policy and statesmanship will necessarily be swayed by political feeling and by reasons of state. But the moment that this bias becomes obvious a Court loses its moral authority, and decisions which might be justified on grounds of policy excite natural indignation and suspicion when they are seen not to be fully justified on grounds of law. American critics indeed are to be found who allege that the Supreme Court not only is proving but always has proved too weak for the burden it is called upon to bear, and that it has from the first been powerless whenever it came into conflict with a State, or could not count upon the support of the Federal Executive. These allegations undoubtedly hit a weak spot in the constitution of the great tribunal. Its judgments are without force, at any rate as against a State if the President refuses the means of putting them into execution. "John Marshall," said Jefferson, "has delivered his judg-"ment; let him now execute it, if he can;" and the judgment was never put into force. But the weight of criticisms repeated from the earliest days of the Union may be easily exaggerated.[1] Laymen are apt to mistake the growth of judicial caution for a sign of

[1] See Davis, *American Constitutions; the Relations of the Three Departments as adjusted by a century.* Mr. Davis is distinctly of opinion that the power of the Courts both of the United States and of the separate States has increased steadily since the foundation of the Union.

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judicial weakness. Foreign observers moreover should notice that in a federation the causes which bring a body such as the Supreme Court into existence, also supply it with a source of ultimate power. The Supreme Court and institutions like it are the protectors of the federal compact, and the validity of that compact is, in the long run, the guarantee for the rights of the separate States. It is the interest of every man who wishes the federal constitution to be observed, that the judgments of the federal tribunals should be respected. It is therefore no bold assumption that, as long as the people of the United States wish to keep up the balanced system of federalism, they will ultimately compel the central government to support the authority of the federal Court. Critics of the Court are almost driven to assert that the American people are indifferent to State Rights. The assertion may or may not be true; it is a matter on which no English critic should speak with confidence. But censures on the working of a federal Court tell very little against such an institution, if they establish nothing more than the almost self-evident proposition that a federal tribunal will be ineffective and superfluous, when the United States shall have ceased to be in reality a federation. A federal Court has no proper place in a unitarian Republic.

Judges, further, must be appointed by some authority which is not judicial, and where decisions of a Court control the action of government there exists an irresistible temptation to appoint magistrates who agree (honestly it may be) with the views of the executive. A strong argument pressed against

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Mr. Blaine's election was, that he would have the opportunity as President of nominating four judges, and that a politician allied with railway companies was likely to pack the Supreme Court with men certain to wrest the law in favour of mercantile corporations. The accusation may have been baseless; the fact that it should have been made, and that even "Republicans" should declare that the time had come when "Democrats" should no longer be excluded from the Bench of the United States, tells plainly enough of the special evils which must be weighed against the undoubted benefits of making the Courts rather than the legislature the arbiters of the constitution.

Federalism impossible where a legal spirit does not prevail.

That a federal system again can flourish only among communities imbued with a legal spirit and trained to reverence the law is as certain as can be any conclusion of political speculation. Federalism substitutes litigation for legislation, and none but a law-fearing people will be inclined to regard the decision of a suit as equivalent to the enactment of a law. The main reason why the United States has carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with legal ideas than any other existing nation. Constitutional questions arising out of either the constitutions of the separate States or the articles of the federal Constitution are of daily occurrence and constantly occupy the Courts. Hence the citizens become a people of constitutionalists, and matters which excite the strongest popular feeling, as for instance the right of Chinese to settle in the country, are determined by the judicial Bench, and

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the decision of the Bench is acquiesced in by the people. This acquiescence or submission is due to the Americans inheriting the legal notions of the common law, *i.e.* of the "most legal system of law" (if the expression may be allowed), in the world. De Tocqueville long ago remarked that the Swiss fell far short of the Americans in reverence for law and justice.[1] The events of the last forty years suggest that he perhaps underrated Swiss submission to law. But the law to which Switzerland is accustomed recognises wide discretionary power on the part of the executive, and has never fully severed the functions of the judge from those of the government. Hence Swiss federalism fails, just where one would expect it to fail, in maintaining that complete authority of the Courts which is necessary to the perfect federal system. But the Swiss, though they may not equal the Americans in reverence for judicial decisions, are a law-respecting nation. One may well doubt whether there are many states to be found where the mass of the people would leave so much political influence to the Courts. Yet any nation who cannot acquiesce in the finality of possibly mistaken judgments is hardly fit to form part of a federal state.

[1] See passage cited, pp. 172-174, *post*.

PART II

THE RULE OF LAW

CHAPTER IV

THE RULE OF LAW: ITS NATURE AND GENERAL APPLICATIONS

Two features have at all times since the Norman Conquest characterised the political institutions of England.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of law and the maintainer of order. The maxim of the Courts, *tout fuit in luy et vient de lui al commencement*,[1] was originally the expression of an actual and undoubted fact. This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the foregoing chapters.[2]

The second of these features, which is closely connected with the first, is the rule or supremacy of law. This peculiarity of our polity is well expressed in the old saw of the Courts, "*La ley est le plus haute in-*

[1] Year Books, xxiv. Edward III.; cited Gneist, *Englische Verwaltungsrecht*, i. p. 454.

[2] See Part I.

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" *heritance, que le roy ad; car par la ley il même et* " *toutes ses sujets sont rulés, et si la ley ne fuit, nul* " *roi, et nul inheritance sera.*"[1]

This supremacy of the law, or the security given under the English constitution to the rights of individuals looked at from various points of view, forms the subject of this part of this treatise.

The rule of law in England noticed by foreign observers.

Foreign observers of English manners, such for example as Voltaire, De Lolme, De Tocqueville, or Gneist, have been far more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law; and admiration or astonishment at the legality of English habits and feeling is nowhere better expressed than in a curious passage from De Tocqueville's writings, which compares the Switzerland and the England of 1836 in respect of the spirit which pervades their laws and manners.

De Tocqueville on the want of respect for law in Switzerland and contrast with England.

" I am not about," he writes, " to compare Switzer- " land with the United States, but with Great Britain. " When you examine the two countries, or even if you " only pass through them, you perceive, in my judg- " ment, the most astonishing differences between them. " Take it all in all, England seems to be much more re- " publican than the Helvetic Republic. The principal " differences are found in the institutions of the two " countries, and especially in their customs (*mœurs*).

" 1. In almost all the Swiss Cantons liberty of the " press is a very recent thing.

" 2. In almost all of them individual liberty is by " no means completely guaranteed, and a man may be

[1] Year Books, xix. Henry VI., cited Gneist, *Englische Verwaltungsrecht*, i. p. 455.

"arrested administratively and detained in prison "without much formality.

"3. The Courts have not, generally speaking, a "perfectly independent position.

"4. In all the Cantons trial by jury is unknown.

"5. In several Cantons the people were thirty-"eight years ago entirely without political rights. "Aargau, Thurgau, Tessin, Vaud, and parts of the "Cantons of Zurich and Berne were in this condition.

"The preceding observations apply even more "strongly to customs than to institutions.

"i. In many of the Swiss Cantons the majority of "the citizens are quite without taste or desire for *self-*"*government*, and have not acquired the habit of it. "In any crisis they interest themselves about their "affairs, but you never see in them the thirst for "political rights and the craving to take part in "public affairs which seem to torment Englishmen "throughout their lives.

"ii. The Swiss abuse the liberty of the press on "account of its being a recent form of liberty, and "Swiss newspapers are much more *revolutionary* and "much less *practical* than English newspapers.

"iii. The Swiss seem still to look upon associa-"tions from much the same point of view as the "French, that is to say, they consider them as a "means of revolution, and not as a slow and sure "method for obtaining redress of wrongs. The art of "associating and of making use of the right of associa-"tion is but little understood in Switzerland.

"iv. The Swiss do not show the love of justice "which is such a strong characteristic of the English. "Their Courts have no place in the political arrange-

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" ments of the country, and exert no influence on " public opinion. The love of justice, the peaceful " and legal introduction of the judge into the domain " of politics, are perhaps the most standing character- " istics of a free people.

" v. Finally, and this really embraces all the rest, " the Swiss do not show at bottom that respect for " justice, that love of law, that dislike of using force, " without which no free nation can exist, which strikes " strangers so forcibly in England.

" I sum up these impressions in a few words.

" Whoever travels in the United States is involun- " tarily and instinctively so impressed with the fact " that the spirit of liberty and the taste for it have " pervaded all the habits of the American people, that " he cannot conceive of them under any but a Repub- " lican government. In the same way it is impossible " to think of the English as living under any but a free " government. But if violence were to destroy the " Republican institutions in most of the Swiss Cantons, " it would be by no means certain that after rather a " short state of transition the people would not grow " accustomed to the loss of liberty. In the United " States and in England there seems to be more liberty " in the customs than in the laws of the people. In " Switzerland there seems to be more liberty in the " laws than in the customs of the country."[1]

Bearing of De Tocqueville's remarks on meaning of rule of law.

De Tocqueville's language has a twofold bearing on our present topic. His words point in the clearest manner to the rule, predominance, or supremacy of law as the distinguishing characteristic of English institutions. They further direct attention to the

[1] See De Tocqueville, *Œuvres Complètes*, viii. pp. 455-457.

xtreme vagueness of a trait of national character vhich is as noticeable as it is hard to portray. De 'ocqueville, we see, is clearly perplexed how to define ature of English manners of which he at once re- nises the existence; ne mingles or confuses together habit of self-government, the love of order, the)ect for justice and a legal turn of mind. All se sentiments are intimately allied, but they cannot without confusion be identified with each other. If however a critic as acute as De Tocqueville found a difficulty in describing one of the most marked peculiarities of English life, we may safely conclude that we ourselves, whenever we talk of Englishmen as ing the government of law, or of the supremacy of as being a characteristic of the English constitu- , are using words which, though they possess a significance, are nevertheless to most persons who)loy them full of vagueness and ambiguity. If efore we are ever to appreciate the full import of the idea denoted by the term "rule, supremacy, or predominance of law," we must first determine precisely what we mean by such expressions when we ly them to the British constitution.

Three meanings of rule of law.

When we say that the supremacy or the rule of is a characteristic of the English constitution, we erally include under one expression at least three inct though kindred conceptions.

Absence of arbitrary power on part of the government.

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts the land. In this sense the rule of law is contrasted th every system of government based on the exer-

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cise by persons in authority of wide, arbitrary, or cretionary powers of constraint.

Contrast between England and the Continent at present day.

Modern Englishmen may at first feel some surp that the "rule of law" (in the sense in which we now using the term) should be considered as in way a peculiarity of English institutions, since, at present day, it may seem to be not so much the perty of any one nation as a trait common to ev civilised and orderly state. Yet, even if we con our observation to the existing condition of Europe, we shall soon be convinced that the "rule of law" even in this narrow sense is peculiar to England, or to those countries which, like the United States o America, have inherited English traditions. In ev continental community the executive exercises wider discretionary authority in the matter of arr of temporary imprisonment, of expulsion from territory, and the like, than is either legally clai or in fact exerted by the government in Engla and recent events in Switzerland, which by the w strikingly confirm De Tocqueville's judgment of national character, remind us that wherever there discretion there is room for arbitrariness, and that i republic no less than under a monarchy discretion authority on the part of the government means in curity for legal freedom on the part of subjects.

Contrast between England and Continent during last century.

If however we confined our observation to t Europe of the year 1889, we might well say that in most European countries the rule of law is now nearly as well established as in England, and that private individuals at any rate who do not meddle in politics have little to fear, as long as they keep the law, eith from the Government or from any one else; and

might therefore feel some difficulty in understanding how it ever happened that to foreigners the absence of arbitrary power on the part of the Crown, of the executive, and of every other authority in England, has always seemed a striking feature, we might almost say the essential characteristic, of the English constitution.[1]

Our perplexity is entirely removed by carrying back our minds to the time when the English constitution began to be criticised and admired by foreign thinkers. During the eighteenth century many of the continental governments were far from oppressive, but there was no continental country where men were secure from arbitrary power. The singularity of England was not so much the goodness or the leniency as the legality of the English system of government. When Voltaire came to England — and Voltaire represented the feeling of his age—his predominant sentiment clearly was that he had passed out of the realm of despotism to a land where the laws might be harsh, but where men were ruled by law and not by caprice.[2] He had good reason to know the difference.

[1] "La liberté est le droit de faire tout ce que les lois permettent; et si un citoyen pouvoit faire ce qu'elles défendent, il n'auroit plus de liberté, parce que les autres auroient tout de même ce pouvoir."—Montesquieu, *De l'Esprit Des Lois*, Livre XI. chap. iii.

"Il y a aussi une nation dans le monde qui a pour objet direct de "sa constitution la liberté politique."—*Ibid.* chap. v. The English are this nation.

[2] "Les circonstances qui contraignaient Voltaire à chercher un "refuge chez nos voisins devaient lui inspirer une grande sympathie "pour des institutions où il n'y avait nulle place à l'arbitraire. 'La "raison est libre ici et n'y connaît point de contrainte.' On y respire "un air plus généreux, l'on se sent au milieu de citoyens qui n'ont pas "tort de porter le front haut, de marcher fièrement, sûrs qu'on n'eût pu "toucher à un seul cheveu de leur tête, et n'ayant à redouter ni lettres de "cachet, ni captivité immotivée."—Desnoiresterres, *Voltaire*, i. p. 365.

Part II. In 1717 Voltaire was sent to the Bastille for a poem which he had not written, of which he did not know the author, and with the sentiment of which he did not agree. What adds to the oddity, in English eyes, of the whole transaction is that the Regent treated the affair as a sort of joke, and, so to speak, "chaffed" the supposed author of the satire "*I have seen*" on being about to pay a visit to a prison which he "had not seen."[1] In 1725 Voltaire, then the literary hero of his country, was lured off from the table of a Duke, was thrashed by lackeys in the presence of their noble master, was unable to obtain either legal or honourable redress; and because he complained of this outrage, paid a second visit to the Bastille. This indeed was the last time in which he was lodged within the walls of a French gaol, but his whole life was a series of contests with arbitrary power, and nothing but his fame, his deftness, his infinite resource, and ultimately his wealth, saved him from penalties far more severe than temporary imprisonment. Moreover, the price at which Voltaire saved his property and his life was after all exile from France. Whoever wants to see how exceptional a phenomenon was that supremacy of law which existed in England during the eighteenth century should read such a book as Morley's *Life of Diderot*. The effort lasting for twenty-two years to get the *Encyclopédie* published was a struggle on the part of all the distinguished literary men in France to obtain utterance for their thoughts. It is hard to say whether the difficulties or the success of the contest bear the strongest witness to the wayward arbitrariness of the French Government.

[1] Desnoiresterres, i. pp. 344-364.

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Royal lawlessness was not peculiar to specially detestable monarchs such as Louis the Fifteenth: it was inherent in the French system of administration. An idea prevails that Louis the Sixteenth at least was not an arbitrary, as he assuredly was not a cruel ruler. But it is an error to suppose that up to 1789 anything like the supremacy of law existed under the French monarchy. The folly, the grievances, and the mystery of the Chevalier D'Eon made as much noise little more than a century ago as the imposture of the Claimant in our own day. The memory of these things is not in itself worth reviving. What does deserve to be kept in remembrance is that in 1778, in the days of Johnson, of Adam Smith, of Gibbon, of Cowper, of Burke and of Mansfield, during the continuance of the American war and within eleven years of the assembling of the States General, a brave officer and a distinguished diplomatist could for some offence still unknown, without trial and without conviction, be condemned to undergo a penance and disgrace which could hardly be rivalled by the fanciful caprice of the torments inflicted by Oriental despotism.[1]

Nor let it be imagined that during the latter part of the eighteenth century the government of France was more arbitrary than that of other countries. To entertain such a supposition is to misconceive utterly the condition of the continent. In France, law and public opinion went for a great deal more than in Spain, the petty States of Italy, or the Principalities of Germany. All the evils of despotism which

[1] It is worth notice that even after the meeting of the States General the King was apparently reluctant to give up altogether the powers exercised by *lettres de cachet*. See "Déclaration des intentions du Roi," art. 15, Picuard, *Les Constitutions Françaises*, p. 10.

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attracted the notice of the world in a great kingdom such as France existed under worse forms in countries where, just because the evil was so much greater, it attracted the less attention. The power of the French monarch was criticised more severely than the lawlessness of a score of petty tyrants, not because the French King ruled more tyrannically than other crowned heads, but because the French people appeared from the eminence of the nation to have a special claim to freedom, and because the ancient kingdom of France was the typical representative of despotism. This explains the thrill of enthusiasm with which all Europe greeted the fall of the Bastille. When the fortress was taken, there were not ten prisoners within its walls; at that very moment hundreds of debtors languished in English gaols. Yet all England hailed the triumph of the French populace with a fervour which to Englishmen of the nineteenth century is at first sight hardly comprehensible. Reflection makes clear enough the cause of a feeling which spread through the length and breadth of the civilised world. The Bastille was the outward and visible sign of lawless power. Its fall was felt, and felt truly, to herald in for the rest of Europe that rule of law which already existed in England.[1]

We mean in the second place,[2] when we speak of the "rule of law" as a characteristic of our country,

[1] For English sentiment with reference to the servitude of the French, see Goldsmith, *Citizen of the World*, iii. Letter iv.; and see *Ibid.*, Letter xxxvii., p. 143, for a contrast between the execution of Lord Ferrers and the impunity with which a French nobleman was allowed to commit murder because of his relationship to the Royal family; and for the general state of feeling throughout Europe, De Tocqueville, *Œuvres Complètes*, viii. pp. 57-72.

[2] For first meaning see p. 175, *ante*.

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Every man subject to ordinary law administered by ordinary tribunals.

not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

In England the idea of legal equality, or of the universal subjection of all classes, to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor,[1] a secretary of state,[2] a military officer,[3] and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person. Officials, such for example as soldiers[4] or clergymen of the Established Church, are, it is true, in England as elsewhere, subject to laws which do not affect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow-countrymen; officials, that is to say, are to a certain extent governed under what may be termed official law. But this fact

[1] *Mostyn* v. *Fabrigas*, Cowp. 161; *Musgrave* v. *Pulido*, 5 App. Ca. 102; *Governor W[illiams]'s case*, 28 St. Tr. 51.

[2] *Entick* v. *Carrington*, 9 St. Tr. 1030.

[3] *Phillips* v. *Eyre*, , 4 Q. B. 225.

[4] As to the legal position of soldiers, see chaps. viii. and ix.

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is in no way inconsistent with the principle that all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.

Contrast in this respect between England and France.

An Englishman naturally imagines that the rule of law (in the sense in which we are now using the term) is a trait common to all civilised societies. But this supposition is erroneous. Most European nations had indeed, by the end of the eighteenth century, passed through that stage of development (from which England emerged before the end of the sixteenth century) when nobles, priests, and others could defy the law. But it is even now far from universally true that in continental countries all persons are subject to one and the same law, or that the Courts are supreme throughout the state. If we take France as the type of a continental state, we may assert, with substantial accuracy, that officials—under which word should be included all persons employed in the service of the state—are, in their official capacity, protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject in many respects only to official law administered by official bodies.[1]

General rules of constitutional law are result of ordinary law of the land.

There remains yet a third and a different sense in which the "rule of law" or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for

[1] See chapter xii. as to the contrast between the rule of law and foreign administrative law, or *droit administratif*.

example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts;[1] whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.

This is one portion at least of the fact vaguely hinted at in the current but misguiding statement that "the constitution has not been made but has "grown." This dictum, if taken literally, is absurd. "Political institutions (however the proposition may "be at times ignored) are the work of men, owe their "origin and their whole existence to human will. Men "did not wake up on a summer morning and find them "sprung up. Neither do they resemble trees, which, "once planted, are 'aye growing' while men 'are "sleeping.' In every stage of their existence they are "made what they are by human voluntary agency."[2]

Yet, though this is so, the dogma that the form of a government is a sort of spontaneous growth so closely bound up with the life of a people that we can hardly treat it as a product of human will and energy, does, though in a loose and inaccurate fashion, bring into view the fact that some polities, and among them the English constitution, have not been created at one stroke, and, far from being the result of legislation, in the ordinary sense of that term, are the fruit of con-

[1] Compare *Calvin's Case*, 7 Coke, Rep. 1; *Campbell* v. *Hall*, Cowp. 204; *Wilkes* v. *Wood*, 19 St. Tr. 1153; *Mostyn* v. *Fabregas*, Cowp. 161. Parliamentary declarations of the law such as the Petition of Right and the Bill of Rights have a certain affinity to judicial decisions.

[2] Mill, *Representative Government*, p. 4.

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tests carried on in the Courts on behalf of the rights of individuals. Our constitution, in short, is a judge-made constitution, and it bears on its face all the features, good and bad, of judge-made law.

Contrast between the English constitution and Foreign constitutions.

Hence flow noteworthy distinctions between the constitution of England and the constitutions of most foreign countries.

There is in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists. Such principles, moreover, as you can discover in the English constitution are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament. To put what is really the same thing in a somewhat different shape, the relation of the rights of individuals to the principles of the constitution is not quite the same in countries like Belgium, where the constitution is the result of a legislative act, as it is in England, where the constitution itself is based upon legal decisions. In Belgium, which may be taken as a type of countries possessing a constitution formed by a deliberate act of legislation, you may say with truth that the rights of individuals to personal liberty flow from or are secured by the constitution.[1] In England the right to individual liberty is part of the constitution, because it is secured by the decisions of the Courts, extended or confirmed as they are by the *Habeas Corpus* Acts. If it be allowable to apply the

[1] See p. 193, *post*.

formulas of logic to questions of law, the difference in this matter between the constitution of Belgium and the English constitution may be described by the statement that in Belgium individual rights are deductions drawn from the principles of the constitution, whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the Courts as to the rights of given individuals.

This is of course a merely formal difference. Liberty is as well secured in Belgium as in England, and as long as this is so it matters nothing whether we say that individuals are free from all risk of arbitrary arrest, because liberty of person is guaranteed by the constitution, or that the right to personal freedom, or in other words to protection from arbitrary arrest, forms part of the constitution because it is secured by the ordinary law of the land. But though this merely formal distinction is in itself of no moment, provided always that the rights of individuals are really secure, the question whether the right to personal freedom or the right to freedom of worship is likely to be secure does depend a good deal upon the answer to the inquiry whether the persons who consciously or unconsciously build up the constitution of their country begin with definitions or declarations of rights, or with the contrivance of remedies by which rights may be enforced or secured. Now, most foreign constitution-makers have begun with declarations of rights.[1] For this they have often been in nowise to blame. Their course of action has more often than not been forced upon them by the stress of

[1] Compare pp. 123-128, *ante*.

Part II. circumstances, and by the consideration that to lay down general principles of law is the proper and natural function of legislators. But any knowledge of history suffices to show that foreign constitutionalists have, while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced. The Constitution of 1791 proclaimed liberty of conscience, liberty of the press, the right of public meeting, the responsibility of government officials.[1] But there never was a period in the recorded annals of mankind when each and all of these rights were so insecure, one might almost say so completely non-existent, as at the height of the French Revolution. And an observer may well doubt whether a good number of these liberties or rights are even now so well protected under the French Republic as under the English Monarchy. On the other hand, there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of judicial legislation. The saw, *ubi jus ibi remedium*, becomes from this point of view something much more important than a mere tautologous proposition. In its bearing upon constitutional law, it means that the Englishmen whose labours gradually framed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies for the enforcement of particular rights or (what is merely the same thing looked at from the other side) for averting definite wrongs, than upon

[1] See Plouard, *Les Constitutions Françoises*, pp. 14-16.

any declaration of the Rights of Man or of Englishmen. The *Habeas Corpus* Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty. Nor let it be supposed that this connection between rights and remedies which depends upon the spirit of law pervading English institutions is inconsistent with the existence of a written constitution, or even with the existence of constitutional declarations of rights. The Constitution of the United States and the constitutions of the separate States are embodied in written or printed documents, and contain declarations of rights.[1] But the statesmen of America have shown unrivalled skill in providing means for giving legal security to the rights declared by American constitutions. The rule of law is as marked a feature of the United States as of England.

The fact, again, that in many foreign countries the

[1] The Petition of Right, and the Bill of Rights, as also the American Declarations of Rights, contain, it may be said, proclamations of general principles which resemble the declarations of rights known to foreign constitutionalists, and especially the celebrated Declaration of the Rights of Man (*Déclaration des Droits de L'homme et Du Citoyen*) of 1789. But the English and American Declarations on the one hand, and foreign declarations of rights on the other, though bearing an apparent resemblance to each other, are at bottom rather by way of contrast than of similarity. The Petition of Rights and the Bill of Rights are not so much "declarations of rights" in the foreign sense of the term, as judicial condemnations of claims or practices on the part of the Crown, which are thereby pronounced illegal. It will be found that every, or nearly every, clause in the two celebrated documents negatives some distinct claim made and put into force on behalf of the prerogative. No doubt the Declarations contained in the American Constitutions have a real similarity to the continental declarations of rights. They are the product of eighteenth century ideas; they have, however, it is submitted, the distinct purpose of legally controlling the action of the legislature by the Articles of the Constitution.

Part II. rights of individuals, *e.g.* to personal freedom, depend upon the constitution, whilst in England the law of the constitution is little else than a generalisation of the rights which the Courts secure to individuals, has this important result. The general rights guaranteed by the constitution may be, and in foreign countries constantly are, suspended. They are something extraneous to and independent of the ordinary course of the law. The declaration of the Belgian constitution, that individual liberty is "guaranteed," betrays a way of looking at the rights of individuals very different to the way in which such rights are regarded by English lawyers. We can hardly say that one right is more guaranteed than another. Freedom from arbitrary arrest, the right to express one's opinion on all matters subject to the liability to pay compensation for libellous or to suffer punishment for seditious or blasphemous statements, and the right to enjoy one's own property, seem to Englishmen all to rest upon the same basis, namely, on the law of the land. To say that the "constitution guaranteed" one class of rights more than the other would be to an Englishman an unnatural or a senseless form of speech. In the Belgian constitution the words have a definite meaning. They imply that no law invading personal freedom can be passed without a modification of the constitution made in the special way in which alone the constitution can be legally changed or amended.[1] This however is not the point to which our immediate attention should be directed. The matter to be noted is, that where the right to individual freedom is a result deduced from the principles of the constitution,

[1] See pp. 113-128, *ante*.

the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation. The so-called "suspension of the *Habeas Corpus* Act" bears, it is true, a certain similarity to what is called in foreign countries "suspending the constitutional guarantees." But, after all, a statute suspending the *Habeas Corpus* Act falls very far short of what its popular name seems to imply; and though a serious measure enough, is not, in reality, more than a suspension of one particular remedy for the protection of personal freedom. The *Habeas Corpus* Act may be suspended and yet Englishmen may enjoy almost all the rights of citizens. The constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.

Summary of meanings of Rule of Law.

That "rule of law" then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

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It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (*droit administratif*) or the "administrative tribunals" (*tribunaux administratifs*) of France.[1] The notion which lies at the bottom of the "administrative law" known to foreign countries is that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

The "rule of law," lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

General propositions however as to the nature of

[1] See chap. xii.

Influence of "Rule of Law" on leading provisions of constitution.

the rule of law carry us but a very little way. If we wait to understand what that principle in all its different aspects and developments really means, we must try to trace its influence throughout some of the main provisions of the constitution. The best mode of doing this is to examine with care the manner in which the law of England deals with the following topics, namely, the right to personal freedom;[1] the right to freedom of discussion;[2] the right of public meeting;[3] the use of martial law;[4] the rights and duties of the army;[5] the collection and expenditure of the public revenue;[6] and the responsibility of Ministers.[7] These topics will each be treated of in their due order. The object, however, of this treatise, as the reader should remember, is not to provide minute and full information, *e.g.* as to the *Habeas Corpus* Acts, or other enactments protecting the liberty of the subject; but simply to show that these leading heads of constitutional law, which have been enumerated, these "articles," so to speak, of the constitution are both governed by, and afford illustrations of the supremacy throughout English institutions of the law of the land. If at some future day the law of the constitution should be codified, each of the topics I have mentioned would be dealt with by the sections of the code. Many of these subjects are actually dealt with in the written constitutions of foreign countries, and notably in the articles of the Constitution, which, as before noticed, is a valuable summary of the leading maxims

[2] Chap. vi. [3] Chap. vii.
[5] Chap. ix. [6] Chap. x.
[7] Chap. xi.

Part II. of English constitutionalism. It will therefore often be a convenient method of illustrating our topic to take the article of the Belgian, or it may be of some other constitution, which bears on the matter in hand, as for example the right to personal freedom, and to consider how far the principle therein embodied is recognised by the law of England; and if it be so recognised, what are the means by which it is maintained or enforced by our Courts. One reason why the law of the constitution is imperfectly understood is, that we too rarely put it side by side with the constitutional provisions of other countries. Here, as elsewhere, comparison is essential to recognition.

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CHAPTER V

THE RIGHT TO PERSONAL FREEDOM

Security for personal freedom under Belgian Constitution.

The seventh article of the Belgian constitution establishes in that country principles which have long prevailed in England. The terms thereof so curiously illustrate by way of contrast some marked features of English constitutional law as to be worth quotation.

"*Art. 7. La liberté individuelle est garantie.*

"*Nul ne peut être poursuivi que dans les cas*
"*prévus par la loi, et dans la forme qu'elle prescrit.*
"*Hors le cas de flagrant délit, nul ne peut être*
"*arrêté qu'en vertu de l'ordonnance motivée du juge,*
"*qui doit être signifiée au moment de l'arrestation, ou*
"*au plus tard dans les vingt-quatre heures.*"[1]

How secured in England.

The security which an Englishman enjoys for personal freedom does not really depend upon or originate in any general proposition contained in any written document. The nearest approach which our statute-book presents to the statement contained in the seventh article of the Belgian constitution is the celebrated thirty-ninth article[2] of the Magna Charta:

[1] *Constitution de la Belgique*, art. 7.
[2] See Stubbs, *Charters*, p. 301.

Part II. "*Nullus liber homo capiatur, vel imprisonetur, aut* "*dissaisiatur, aut utlagetur, aut exuletur, aut aliquo* "*modo destruatur, nec super eum ibimus, nec super* "*eum mittemus, nisi per legale judicium parium* "*suorum vel per legem terrae,*" which should be read in combination with the declarations of the Petition of Right. And these enactments (if such they can be called) are rather records of the existence of a right than statutes which confer it. The expression again, "guaranteed," is, as I have already pointed out, extremely significant; it suggests the notion that personal liberty is a special privilege insured to Belgians by some power above the ordinary law of the land. This is an idea utterly alien to English modes of thought, since with us freedom of person is not a special privilege but the outcome of the ordinary law of the land enforced by the Courts. Here, in short, we may observe the application in a particular case of the general principle that with us individual rights are the basis not the result of the English constitution.

The proclamation in a constitution or charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence, and students who wish to know how far the right to freedom of person is in reality part of the law of the constitution must consider both what is the meaning of the right and, a matter of even more consequence, what are the legal methods by which its exercise is secured.

The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other

physical coercion in any manner that does not admit of legal justification. That anybody should suffer physical restraint is in England *primâ facie* illegal, and can be justified (speaking in very general terms) on two grounds only, that is to say, either because the prisoner or person suffering restraint is accused of some offence and must be brought before the Courts to stand his trial, or because he has been duly convicted of some offence and must suffer punishment for it. Now personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law, *i.e.* (speaking again in very general terms indeed) under some legal warrant or authority,[1] and, what is of far more consequence, it is secured by the provision of adequate legal means for the enforcement of this principle. These methods are twofold;[2] namely, redress for unlawful arrest or imprisonment by means of a prosecution or an action, and deliverance from unlawful imprisonment by means of the writ of *habeas corpus*. Let us examine the general character of each of these remedies.

Proceedings for wrongful arrest.

i. *Redress for Arrest.* — If we use the term redress in a wide sense, we may say that a person who has suffered a wrong obtains redress either

[1] See as to arrests, Stephen, *Commentaries*, iv. (8th ed.), pp. 340-349.

[2] Another means by which personal liberty or other rights may be protected is the allowing a man to protect or assert his rights by force against a wrongdoer without incurring legal liability for injury done to the aggressor. The limits within which English law permits so-called "self-defence," or more accurately "the assertion of legal rights by the use of a person's own force," is one of the obscurest legal questions. See Appendix, Note 3, Right of Self-Defence.

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when he gets the wrongdoer punished or when he obtains compensation for the damage inflicted upon him by the wrong.

Each of these forms of redress is in England open to every one whose personal freedom has been in any way unlawfully interfered with. Suppose, for example, that *X* without legal justification assaults *A*, by knocking him down, or deprives *A* of his freedom—as the technical expression goes, "imprisons" him—whether it be for a length of time, or only for five minutes; *A* has two courses open to him. He can have *X* convicted of an assault and thus cause him to be punished for his crime, or he can bring an action of trespass against *X* and obtain from *X* such compensation for the damage which *A* has sustained from *X*'s conduct as a jury think that *A* deserves. Suppose that in 1725 Voltaire had at the instigation of an English lord been treated in London as he was treated in Paris. He would not have needed to depend for redress upon the goodwill of his friends or upon the favour of the Ministry. He could have pursued one of two courses. He could by taking the proper steps have caused all his assailants to be brought to trial as criminals. He could, if he had preferred it, have brought an action against each and all of them: he could have sued the nobleman who caused him to be thrashed, the footmen who thrashed him, the policemen who threw him into gaol, and the gaoler or lieutenant who kept him there. Notice particularly that the action for trespass, to which Voltaire would have had recourse, can be brought, or, as the technical expression goes, "lies" against every person throughout the realm. It can and has

been brought against governors of colonies, against secretaries of state, against officers who have tried by Court-martial persons not subject to military law, against every kind of official high or low. Here then we come across another aspect of the "rule of law." No one of Voltaire's enemies would, if he had been injured in England, have been able to escape his responsibility on the plea of acting in an official character or in obedience to his official superiors. Nor would any one of them have been able to say that because he was a government officer he must be tried by an official Court. Voltaire, to keep to our example, would have been able in England to have brought each and all of his assailants, including the officials who kept him in prison, before an ordinary Court, and therefore before judges and jurymen who were not at all likely to think that official zeal or the orders of official superiors were either a legal or a moral excuse for breaking the law.

Before quitting the subject of the redress afforded by the Courts for the damage caused by illegal interference with any one's personal freedom, we shall do well to notice the strict adherence of the judges in this as in other cases to two maxims or principles which underlie the whole law of the constitution, and the maintenance of which has gone a great way both to ensure the supremacy of the law of the land and ultimately to curb the arbitrariness of the Crown. The first of these maxims or principles is that every wrongdoer is individually responsible for every unlawful or wrongful act in which he takes part, and, what is really the same thing looked at from another point of view, cannot, if the act be unlawful, plead in his

Part II. defence that he did it under the orders of a master or superior. Voltaire, had he been arrested in England, could have treated each and all of the persons engaged in the outrage as individually responsible for the wrong done to him. Now this doctrine of individual responsibility is the real foundation of the legal dogma that the orders of the King himself are no justification for the commission of a wrongful or illegal act. The ordinary rule, therefore, that every wrongdoer is individually liable for the wrong he has committed, is the foundation on which rests the great constitutional doctrine of Ministerial responsibility. The second of these noteworthy maxims is that the Courts give a remedy for the infringement of a right whether the injury done be great or small. The assaults and imprisonment from which Voltaire suffered were serious wrongs; but it would be an error to fancy, as persons who have no experience in the practice of the Courts are apt to do, that proceedings for trespass or for false imprisonment can be taken only where personal liberty is seriously interfered with. Ninety-nine out of every hundred of actions for assault or false imprisonment have reference to injuries which in themselves are trifling. If one ruffian gives another a blow, if a policeman makes an arrest without lawful authority, if a schoolmaster keeps a scholar locked up at school for half an hour after he ought to have let the child go home,[1] if in short *X* interferes unlawfully to however slight a degree with the personal liberty of *A*, the offender exposes himself to proceedings in a Court of Law, and the sufferer, if he can enlist the sympathies of

[1] *Hunter* v. *Johnson*, 13 Q. B. D. 225.

a jury, may recover heavy damages for the injury which he has or is supposed to have suffered. The law of England protects the right to personal liberty, as also every other legal right, against every kind of infringement, and gives the same kind of redress (I do not mean, of course, inflicts the same degree of punishment or penalty) for the pettiest as for the gravest invasions of personal freedom. This seems to us so much a matter of course as hardly to call for observation, but it may be suspected that few features in our legal system have done more to maintain the authority of the law than the fact that all offences great and small are dealt with on the same principles and by the same Courts. The law of England now knows nothing of exceptional offences punished by extraordinary tribunals.[1]

The right of a person who has been wrongfully imprisoned on regaining his freedom to put his oppressor on trial as a criminal, or by means of an action to obtain pecuniary compensation for the wrong which he has endured, affords a most insufficient security for personal freedom. If *X* keeps *A* in confinement, it profits *A* little to know that if he could recover his freedom, which he cannot, he could punish and fine *X*. What *A* wants is to recover his liberty. Till this is done he cannot hope to punish the foe who has deprived him of it. It would have been little consolation for Voltaire to know that if he could have got out of the Bastille he could recover damages from his enemies. The possibility that he might when he got free have obtained redress for

[1] Contrast with this the extraordinary remedies adopted under the old French monarchy for the punishment of powerful criminals.

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the wrong done him might, so far from being a benefit, have condemned him to lifelong incarceration. Liberty is not secure unless the law, in addition to punishing every kind of interference with a man's lawful freedom, provides adequate security that every one who without legal justification is placed in confinement shall be able to get free. This security is provided by the celebrated writ of *habeas corpus* and the *Habeas Corpus* Acts.

Writ of *habeas corpus*.

ii. *Writ of Habeas Corpus.*[1]—It is not within the scope of these lectures to give a history of the writ of *habeas corpus* or to provide the details of the legislation with regard to it. For minute information both about the writ and about the *Habeas Corpus* Acts you should consult the ordinary legal text-books. My object is solely to explain generally the mode in which the law of England secures the right to personal freedom. I shall therefore call attention to the following points: first, the nature of the writ; secondly, the effect of the so-called *Habeas Corpus* Acts; thirdly, the precise effect of what is called (not quite accurately) the Suspension of the *Habeas Corpus* Act; and, lastly, the relation of any Act suspending the operation of the *Habeas Corpus* Act to an Act of Indemnity. Each of these matters has a close bearing on the law of the constitution.

Nature of Writ.

Nature of Writ.—Legal documents constantly give the best explanation and illustration of legal principles. We shall do well therefore to examine with care the following copy of a writ of *habeas corpus*:—

[1] See Stephen, *Commentaries*, iii. 627-636; 16 Car. I. c. 10; 31 Car. II. c. 2; 56 George III. c. 100; Forsyth, *Opinions*, 436-452, 481.

"*Victoria, by the Grace of God, of the United* "*Kingdom of Great Britain and Ireland, Queen,* "*Defender of the Faith,*

"*To J. K., Keeper of our Gaol of Jersey, in the* "*Island of Jersey, and to J. C. Viscount of said* "*Island, greeting. We command you that you have* "*the body of C. C. W. detained in our prison under* "*your custody, as it is said, together with the day and* "*cause of his being taken and detained, by whatsoever* "*name he may be called or known, in our Court before* "*us, at Westminster, on the* 18*th day of January next,* "*to undergo and receive all and singular such matters* "*and things which our said Court shall then and there* "*consider of him in this behalf; and have there then* "*this Writ. Witness* THOMAS *Lord* DENMAN, *at* "*Westminster, the* 23*rd day of December in the* 8*th* "*year of our reign.*

"*By the Court,*
"*Robinson.*"[1]

"*At the instance of C. C. W.*
"*R. M. R.*"

"*W. A. L.,* 7 *Gray's Inn Square, London,*
"*Attorney for the said C. C. W.*"

The character of the document is patent on its face. It is an order issued, in the particular instance, by the Court of Queen's Bench, calling upon a person by whom a prisoner is alleged to be kept in confinement to bring such prisoner—to "have his body,"

[1] *Carus Wilson's Case*, 7 Q. B. 984, 988. In this particular case the writ calls upon the gaoler of the prison to have the body of the prisoner before the Court by a given day. It more ordinarily calls upon him to have the prisoner before the Court "immediately after the receipt of this writ."

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whence the name *habeas corpus*—before the Court to let the Court know on what ground the prisoner is confined, and thus to give the Court the opportunity of dealing with the prisoner as the law may require. The essence of the whole transaction is that the Court can by the writ of *habeas corpus* cause any person who is imprisoned to be actually brought before the Court and obtain knowledge of the reason why he is imprisoned; and then having him before the Court, either then and there set him free or else see that he is dealt with in whatever way the law requires, as, for example, brought speedily to trial.

The writ can be issued on the application either of the prisoner himself or of any person on his behalf, or (supposing the prisoner cannot act) then on the application of any person who believes him to be unlawfully imprisoned. It is issued by the High Court or during vacation by any judge thereof; and the Court or a judge should and will always cause it to be issued on being satisfied by affidavit that there is reason to suppose a prisoner to be wrongfully deprived of his liberty. You cannot say with strictness that the writ is issued "as a matter of course," for some ground must be shown for supposing that a case of illegal imprisonment exists. But the writ is granted "as a matter of right,"—that is to say, the Court will always issue it if *primâ facie* ground is shown for supposing that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ or order of the Court can be addressed to any person whatever, be he an official or a private individual, who has, or is supposed to have, another in his custody. Any disobedience to the writ exposes

the offender to summary punishment for contempt of Court,[1] and also in many cases to heavy penalties recoverable by the party aggrieved.[2] To put the matter therefore, in the most general terms, the case stands thus. The High Court of Justice possesses, as the tribunals which make up the High Court used to possess, the power by means of the writ of *habeas corpus* to cause any person who is alleged to be kept in unlawful confinement to be brought before the Court. The Court can then inquire into the reason why he is confined, and can, should it see fit, set him then and there at liberty. This power moreover is one which the Court always will exercise whenever ground is shown by any applicant whatever for the belief that any man in England is unlawfully deprived of his liberty.

Habeas Corpus Acts.

The Habeas Corpus Acts.—The right to the writ of *habeas corpus* existed at common law long before the passing in 1679 of the celebrated *Habeas Corpus* Act,[3] 31 Car. II. cap. 2, and you may wonder how it has happened that this and the subsequent Act, 56 Geo. III. c. 100, are treated, and (for practical purposes) rightly treated, as the basis on which rests an Englishman's security for the enjoyment of his personal freedom. The explanation is, that prior to 1679 the right to the writ was often under various pleas and excuses made of no effect. The aim of the *Habeas Corpus* Acts has been to meet all the devices by which the effect of the writ can be evaded, either on the part of the judges, who ought to issue the

[1] *Rex* v. *Winton*, 5 T. R. 89, and conf. 56 Geo. III. c. 100, s. 2; see Corner, *Practice of the Crown Side of the Court of Queen's Bench*.

[2] 31 Car. II. c. 2, s. 4. [3] See also 16 Car. I. c. 10, s. 6.

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same, and if necessary discharge the prisoner, or on the part of the gaoler or other person who has the prisoner in custody. The earlier Act of Charles the Second applies to persons imprisoned on a charge of crime; the later Act of George the Third applies to persons deprived of their liberty otherwise than on a criminal accusation.

Take these two classes of persons separately.

31 Car. II. c. 2.

A person is imprisoned on a charge of crime. If he is imprisoned without any legal warrant for his imprisonment he has a right to be set at liberty. If on the other hand he is imprisoned under a legal warrant, the object of his detention is to ensure his being brought to trial. His position in this case differs according to the nature of the offence with which he is charged. In the case of the lighter offences known as misdemeanours he has, generally speaking,[1] the right to his liberty on giving security with proper sureties that he will in due course surrender himself to custody and appear and take his trial on such indictment as may be found against him in respect of the matter with which he is charged, or (to use technical expressions) he has the right to be admitted to bail. In the case, on the other hand, of the more serious offences, such as felonies or treasons, a person who is once committed to prison is not entitled to be let out on bail. The right of the prisoner is in this case simply the right to a speedy trial. The effect of the writ of *habeas corpus* would be evaded either if the Court did not examine into the

[1] See Stephen, *Digest of the Law of Criminal Procedure*, art. 276, note 1, and also art. 136 and p. 89, note 1. Compare 11 & 12 Vict. c. 42, s. 23.

validity of the warrant on which the prisoner was detained, and if the warrant were not valid release on, or, if the Court on ascertaining that he was illy imprisoned, did not cause him according to umstances either to go out on bail or to be speedily ught to trial.

The Act provides against all these possible failures of justice. The law as to persons imprisoned under accusations of crime stands through the combined effect of the rules of the common law and of the statute in substance as follows. The gaoler who has such person in custody is bound when called upon to have the prisoner before the Court with the true cause of his commitment. If the cause is insufficient the prisoner must of course be discharged; if the cause is sufficient the prisoner, in case he is charged with a misdemeanour, can in general insist upon being bailed till trial; in case on the other hand the charge is one of treason or felony he can insist upon being tried at the first sessions after his committal, or if he is not then tried, upon being bailed, unless the witnesses for the Crown cannot appear. If he is not tried at the second sessions after his commitment he can insist upon his release without bail. The net result, therefore, appears to be that while the *Habeas Corpus* Act is in force no person committed to prison on a charge of crime can be kept long in confinement, for he has the legal means of insisting upon either being let out upon bail or else of being brought to a speedy trial.

A person, again, who is detained in confinement but not on a charge of crime needs for his protection the means of readily obtaining a legal decision on

56 Geo. III. c. 100.

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the lawfulness of his confinement, and also of getting an immediate release if he has by law a right to his liberty. This is exactly what the writ of *habeas corpus* affords. Whenever any Englishman or foreigner is alleged to be wrongfully deprived of liberty the Court will issue the writ, have the person aggrieved brought before the Court, and if he has a right to liberty set him free. Thus if a child is forcibly kept apart from his parents,[1] if a man is wrongfully kept in confinement as a lunatic, if a nun is alleged to be prevented from leaving her convent, —if, in short, any man, woman, or child is, or is asserted on apparently good grounds to be deprived of liberty, the Court will always issue a writ of *habeas corpus* to any one who has the aggrieved person in his custody to have such person brought before the Court, and if he is suffering restraint without lawful cause, set him free. Till, however, the year 1816 (56 Geo. III.) the machinery for obtaining the writ was less perfect in the case of persons not accused of crime than in the case of those charged with criminal offences, and the effect of 56 Geo. III. c. 100 was in substance to apply to non-criminal cases the machinery of the great *Habeas Corpus* Act, 31 Car. II. c. 2.

At the present day, therefore, the securities for personal freedom are in England as complete as laws can make them. The right to its enjoyment is absolutely acknowledged. Any invasion of the right entails either imprisonment or fine upon the wrongdoer; and any person, whether charged with crime or not, who is even suspected to be wrongfully imprisoned,

[1] See *The Queen* v. *Nash*, 10 Q. B. D. (C. A.), 454;-and compare *Re Agar-Ellis*, 24 Ch. D. (C.A.), 317.

as, if there exists a single individual willing to xert himself on the victim's behalf, the certainty of aving his case duly investigated, and, if he has been vronged, of recovering his freedom. Let us return or a moment to a former illustration, and suppose hat Voltaire has been treated in London as he was reated in Paris. He most certainly would very apidly have recovered his freedom. The procedure vould not, it is true, have been in 1725 quite as easy s it is now under the Act of George the Third. Still, ven then it would have been within the power of ny one of his friends to put the law in motion. It ould have been at least as easy to release Voltaire in 725 as it was in 1773 to obtain by means of *habeas rpus* the freedom of the slave James Sommersett hen actually confined in irons on board a ship lying the Thames and bound for Jamaica.[1]

The whole history of the writ of *habeas corpus* lustrates the predominant attention paid under the nglish constitution to "remedies," that is, to modes procedure by which to secure respect for a legal ght, and by which to turn a merely nominal into effective or real right. The *Habeas Corpus* Acts e essentially procedure Acts, and simply aim at nproving the legal mechanism by means of which e acknowledged right to personal freedom may be nforced. They are intended, as is generally the case ith legislation which proceeds under the influence of wyers, simply to meet actual and experienced diffi-lties. Hence the *Habeas Corpus* Act of Charles e Second's reign was an imperfect or very restricted ece of legislative work, and Englishmen waited

[1] *Sommersett's Case*, 20 St. Tr. 1.

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nearly a century and a half (1679-1816) before th procedure for securing the right to discharge fro unlawful confinement was made complete. But thi lawyer-like mode of dealing with a fundamental righ had with all its defects the one great merit that legis lation was directed to the right point. There is n difficulty, and there is often very little gain, i declaring the existence of a right to personal freedom The true difficulty is to secure its enforcement. Th *Habeas Corpus* Acts have achieved this end, an have therefore done for the liberty of Englishme more than could have been achieved by any declara tion of rights. One may even venture to say tha these Acts are of really more importance not onl than the general proclamations of the Rights of Ma which have often been put forward in foreign countrie but even than such very lawyer-like documents as th Petition of Right or the Bill of Rights, though thes celebrated enactments show almost equally with th *Habeas Corpus* Act that the law of the Englis constitution is at bottom judge-made law.[1]

Effect of writ of *habeas corpus* on authority of judges.

Every critic of the constitution has observed th effect of the *Habeas Corpus* Acts in securing th liberty of the subject; what has received less at deserves as much attention is the way in which th right to issue a writ of *habeas corpus*, strengthene as that right is by statute, determines the who relation of the judicial body towards the executiv The authority to enforce obedience to the writ nothing less than the power to release from impriso

[1] Compare Imperial Constitution of 1804, ss. 60-63, under whi a committee of the Senate was empowered to take steps for putting end to illegal arrests by the Government. See Plouard, *Les Consti tions Françaises*, p. 161.

ent any person who in the opinion of the Court is lawfully deprived of his liberty, and hence in effect put an end to or to prevent any punishment which e Crown or its servants may attempt to inflict in position to the rules of law as interpreted by the dges. The judges therefore are in truth, though t in name, invested with the means of hampering supervising the whole administrative action of the vernment, and of at once putting a veto upon any oceeding not authorised by the letter of the law. or is this power one which has fallen into disuse by nt of exercise. It has often been put forth, and is too in matters of the greatest consequence; the owledge moreover of its existence governs the con- ct of the administration. An example or two will st show the mode in which the "judiciary" (to use convenient Americanism) can and do by means the writ of *habeas corpus* keep a hold on the acts the executive. In 1839 Canadian rebels, found ilty of treason in Canada and condemned to trans- rtation, arrived in official custody at Liverpool on eir way to Van Diemen's Land. The friends of the nvicts questioned the validity of the sentence under nich they were transported: the prisoners were ereupon taken from prison and brought upon a writ *habeas corpus* before the Court of Exchequer. neir whole position having been considered by the urt, it was ultimately held that the imprisonment as legal. But had the Court taken a different view, e Canadians would at once have been released from nfinement.[1] In 1859 an English officer serving in dia was duly convicted of manslaughter and sent-

[1] *The Case of the Canadian Prisoners*, 5 M. & W. 32.

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enced to four years' imprisonment: he was sent England in military custody to complete there term of punishment. The order under which he v brought to this country was technically irregular, a the convict having been brought on a writ of *habe corpus* before the Queen's Bench, was on this pur technical ground set at liberty.[1] So, to take a ve notorious instance of judicial authority in matt most nearly concerning the executive, the Courts ha again and again considered, in the case of persc brought before them by the writ of *habeas corp* questions as to the legality of impressment, and as the limits within which the right of impressment m be exercised; and if, on the one hand, the judg have in this particular instance (which by the way almost a singular one) supported the arbitrary pow of the prerogative, they have also strictly limited t exercise of this power within the bounds prescrib to it by custom or by statute.[2] Moreover, as alrea pointed out, the authority of the civil tribunals ev when not actually put into force regulates the acti of the government. In 1854 a body of Russian sail were found wandering about the streets of Guildfo without any visible means of subsistence; they w identified by a Russian naval officer as deserters fr a Russian man-of-war which had put into an Engl port; they were thereupon, under his instructi and with the assistance of the superintendent police, conveyed to Portsmouth for the purpose

[1] *In re Allen*, 30 L. J. (Q. B.), 38.

[2] See *Case of Pressing Mariners*, 18 St. Tr. 1323; Stephen, *C mentaries*, ii. p. 595; Conf. Corner, *Forms of Writs on Crown Sid Court of Queen's Bench*, for form of *habeas corpus* for an impre seaman.

their being carried back to the Russian ship. Doubts arose as to the legality of the whole proceeding. The law officers were consulted, who thereupon gave it as their opinion that "the delivering-up of the Russian "sailors to the Lieutenant and the assistance offered by "the police for the purpose of their being conveyed "back to the Russian ship were contrary to law."[1] The sailors were presumably released; they no doubt would have been delivered by the Court had a writ of *habeas corpus* been applied for. Here then we see the judges in effect restraining the action of the executive in a matter which in most countries will be considered one of administration or of policy lying beyond the range of judicial interference. The strongest examples, however, of interference by the judges with administrative proceedings are to be found in the decisions given under the Extradition Acts. Neither the Crown nor any servant of the Crown has any right to expel a foreign criminal from the country or to surrender him to his own government for trial.[2] A French forger, robber, or murderer who escapes from France to England cannot, independently of statutory enactments, be sent back to his native land for trial or punishment. The absence

[1] See Forsyth, *Opinions*, p. 468.

[2] See, however, *Rex* v. *Lundy*, 2 Ventris, 314; *Rex* v. *Kimberley*, 2 Stra., 848; *East India Company* v. *Campbell*, 1 Ves. Senr., 246; *Mure* v. *Kaye*, 4 Taunt, 34; and Chitty, *Criminal Law* (1826), pp. 14, 16, in support of the opinion that the Crown possessed a common law right of extradition as regards foreign criminals. This opinion may possibly once have been correct, but has (to use the words of a high authority) "ceased to be law now. If any magistrate were now to "arrest a person on this ground, the validity of the commitment would "certainly be tested, and, in the absence of special legislative provisions, "the prisoner as certainly discharged upon application to one of the "superior Courts."—Clarke, *Extradition* (3d ed.), p. 27.

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of any power on the part of the Crown to surrender foreign criminals to the authorities of their own state has been found so inconvenient, that in recent times Extradition Acts have empowered the Crown to make treaties with foreign states for the mutual extradition of criminals or of persons charged with crime. The exercise of this authority is, however, hampered by restrictions which are imposed by the statute under which alone it exists. It therefore often happens that an offender arrested under the warrant of a Secretary of State and about to be handed over to the authorities of his own country conceives that, on some ground or other, his case does not fall within the precise terms of any Extradition Act. He applies for a writ of *habeas corpus;* he is brought up before the High Court; every technical plea he can raise obtains full consideration, and if on any ground whatever it can be shown that the terms of the Extradition Act have not been complied with, or that they do not justify his arrest and surrender, he is as a matter of course at once set at liberty.[1] It is easy to perceive that the authority of the judges, exercised, as it invariably must be, in support of the strict rules of law, cuts down the discretionary powers of the Crown. It often prevents the English government from meeting public danger by measures of precaution which would as a matter of course be taken by the executive of any continental country. Suppose, for example, that a body of foreign anarchists come to England and are thought by the police on strong grounds of suspicion to be engaged in a plot, say for blowing up the Houses of Parliament. Suppose also that the existence of

[1] *In re Coppin*, L. R. 2 Ch. 47; *The Queen* v. *Wilson*, 3 Q. B. D. 42.

the conspiracy does not admit of absolute proof. An English Minister, if he is not prepared to put the conspirators on their trial, has no means of arresting them, or of expelling them from the country. In case of arrest or imprisonment they would at once be brought before the High Court on a writ of *habeas corpus*, and unless some specific legal ground for their detention could be shown they would be forthwith set at liberty. Of the political or, to use foreign expressions, of the "administrative" reasons which might make the arrest or expulsion of a foreign refugee highly expedient, the judges would hear nothing; that he was arrested by order of the Secretary of State, that his imprisonment was a simple administrative act, that the Prime Minister or the Home Secretary was prepared to make affidavit that the arrest was demanded by the most urgent considerations of public safety, or to assure the Court that the whole matter was one of high policy and concerned national interests, would be no answer whatever to the demand for freedom under a writ of *habeas corpus*. All that any judge could inquire into would be, whether there was any rule of common or of statute law which would authorise interference with a foreigner's personal freedom. If none such could be found, the applicants would assuredly obtain their liberty. The plain truth is that the power possessed by the judges of controlling the administrative conduct of the executive has been, of necessity, so exercised as to prevent the development with us of any system corresponding to the "administrative law" of continental states. It strikes at the root of those theories as to the nature of "administrative

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acts," and as to the "separation of powers," on which, as will be shown in a later chapter,[1] the *droit administratif* of France depends, and it deprives the Crown, which now means the Ministry of the day, of all discretionary authority. The actual or possible intervention, in short, of the Courts, exercisable for the most part by means of the writ of *habeas corpus*, confines the action of the government within the strict letter of the law; with us the state can punish, but it can hardly prevent the commission of crimes.

Contests of seventeenth century about position of judges.

We can now see why it was that the political conflicts of the seventeenth century often raged round the position of the judges, and why the battle might turn on a point so technical as the inquiry, what might be a proper return to a writ of *habeas corpus*.[2] Upon the degree of authority and independence to be conceded to the Bench depended the colour and working of our institutions. To supporters on the one hand of the prerogative who, like Bacon, were not unfrequently innovators or reformers, judicial independence appeared to mean the weakness of the executive, and the predominance throughout the state of the conservative legalism, which found a representative in Coke. The Parliamentary leaders, on the other hand, saw, more or less distinctly, that the independence of the Bench was the sole security for the maintenance of the common law, which was nothing else than the rule of established customs modified only by Acts of Parliament, and that Coke in battling for the power of the judges was asserting the rights of the nation; they possibly also saw, though this is uncertain, that the maintenance of rigid legality, inconvenient as it might

[1] See chap. xii.

[2] *Darnel's Case*, 3 St. Tr. 1.

sometimes prove, was the certain road to Parliamentary sovereignty.[1]

Suspension of *Habeas Corpus*

Suspension of the Habeas Corpus Act.—During periods of political excitement the power or duty of the Courts to issue a writ of *habeas corpus*, and thereby compel the speedy trial or release of persons charged with crime, has been found an inconvenient or dangerous limitation on the authority of the executive government. Hence has arisen the occasion for statutes which are popularly called *Habeas Corpus* Suspension Acts. I say "popularly called," because if you take (as you may) the Act 34 Geo. III. c. 54 as a type of such enactments, you will see that it hardly corresponds with its received name. The whole effect of the Act, which does not even mention the *Habeas Corpus* Act, is to make it impossible for any person imprisoned under a warrant signed by a Secretary of State on a charge of high treason, or on suspicion of high treason, to insist upon being either discharged or put on trial. No doubt this is a great diminution in the securities for personal freedom provided by the *Habeas Corpus* Acts; but it falls very far short of anything like a general suspension of the right to the writ of *habeas corpus*; it in no way affects the privileges of any person not imprisoned on a charge of high treason; it does not legalise any arrest, imprisonment, or punishment which was not lawful before the Suspension Act passed; it does not in anywise touch the claim to a writ of *habeas corpus* possessed by

[1] See Gardiner, *History of England*, ii. chap. xxii., for an admirable statement of the different views entertained as to the position of the judges.

Part II. every one, man, woman, or child, who is held in confinement otherwise than on a charge of crime. The particular statute, 34 Geo. III. c. 54 is, and (I believe) every other *Habeas Corpus* Suspension Act affecting England has been, an annual Act, and must therefore, if it is to continue in force, be renewed year by year. The sole, immediate, and direct result therefore of suspending the *Habeas Corpus* Act is this: the Ministry may for the period during which the Suspension Act continues in force constantly defer the trial of persons imprisoned on the charge of treasonable practices. This increase in the power of the executive is no trifle, but it falls far short of the process known in some foreign countries as "suspending the constitutional guarantees," or in France as the "proclamation of a state of siege;"[1] it, indeed, extends the arbitrary powers of the government to a far less degree than many so-called Coercion Acts. That this is so may be seen by a mere enumeration of the chief of the extraordinary powers which were conferred by recent enactments on the Irish executive. Under the Act of 1881 (44 Vict. c. 4) the Irish executive obtained the absolute power of arbitrary and preventive arrest, and could without breach of law detain in prison any person arrested on suspicion for the whole period for which the Act continued in force. It is true that the Lord Lieutenant could arrest only persons suspected of treason or of the commission of some act tending to interfere with the maintenance of law and order. But as the warrant itself to be issued

[1] See p. 279, *post.* Conf. "État de Siége" in Chéruel, *Dictionnaire Historique des Institutions de la France* (6th ed.)

by the Lord Lieutenant was made under the Act conclusive evidence of all matters contained therein, and therefore (*inter alia*) of the truth of the assertion that the arrested person or "suspect" was reasonably suspected, *e.g.* of treasonable practices, and therefore liable to arrest, the result clearly followed that neither the Lord Lieutenant nor any official acting under him could by any possibility be made liable to any legal penalty for any arrest, however groundless or malicious, made in due form within the words of the Act. The Irish government therefore could arrest any person whom the Lord Lieutenant thought fit to imprison, provided only that the warrant was in the form and contained the allegations required by the statute. Under the Prevention of Crime (Ireland) Act, 1882—45 & 46 Vict. c. 25—the Irish executive was armed with the following (among other) extraordinary powers. The government could abolish the right to trial by jury,[1] could arrest strangers found out of doors at night under suspicious circumstances,[2] could seize any newspaper which in the judgment of the Lord Lieutenant contained matter inciting to treason or violence,[3] and could prohibit any public meeting which the Lord Lieutenant believed to be dangerous to the public peace or safety. Add to this that the Prevention of Crime Act, 1882, re-enacted (incidentally as it were) the Alien Act of 1848, and thus empowered the British Ministry to expel from the United Kingdom any foreigner who had not before the passing of the Act been resident in the country for three years.[4] Not one of these extraordinary

[1] Sect. 1. [2] Sect. 12. [3] Sect. 13. [4] Sect. 15.

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powers flows directly from a mere suspension of the *Habeas Corpus* Act, and, in truth, the best proof of the very limited legal effect of such so-called "suspension" is supplied by the fact that before a *Habeas Corpus* Suspension Act runs out its effect is, almost invariably, supplemented by legislation of a totally different character, namely, an Act of Indemnity.

Act of Indemnity.

An Act of Indemnity.—Reference has already been made to Acts of Indemnity as the supreme instance of Parliamentary sovereignty.[1] They are retrospective statutes which free persons who have broken the law from responsibility for its breach, and thus make lawful acts which when they were committed were unlawful. It is easy enough to see the connection between a *Habeas Corpus* Suspension Act and an Act of Indemnity. The Suspension Act, as already pointed out, does not free any person from civil or criminal liability for a violation of the law. Suppose that a Secretary of State or his subordinates should, during the suspension of the *Habeas Corpus* Act, arrest and imprison a perfectly innocent man without any cause whatever, except (it may be) the belief that it is conducive to the public safety, that the particular person—say, an influential party leader such as Wilkes, Fox, or O'Connell—should be at a particular crisis kept in prison, and thereby deprived of influence. Suppose, again, that an arrest should be made by orders of the Ministry under circumstances which involve the unlawful breaking into a private dwelling-house, the destruction of private property, or the like. In each of these instances, and in many others which might easily be

[1] See pp. 47, 48, *ante*.

imagined, the Secretary of State who orders the arrest and the officials who carry out his commands have broken the law. They may have acted under the *bonâ fide* belief that their conduct was justified by the necessity of providing for the maintenance of order. But this will not of itself, whether the *Habeas Corpus* Act be suspended or not, free the persons carrying out the arrests from criminal and civil liability for the wrong they have committed. The suspension indeed of the *Habeas Corpus* Act prevents the person arrested from taking at the moment any proceedings against a Secretary of State or the officers who have acted under his orders. For the sufferer is of course imprisoned on the charge of high treason or suspicion of treason, and therefore will not, while the suspension lasts, be able to get himself discharged from prison. The moment however that the Suspension Act expires he can of course apply for a writ of *habeas corpus*, and ensure that, either by means of being put on his trial or otherwise, his arbitrary imprisonment shall be brought to an end. In the cases we have supposed the prisoner has been guilty of no legal offence. The offenders are in reality the Secretary of State and his subordinates. The result is that on the expiration of the Suspension Act they are liable to actions or indictments for their illegal conduct, and can derive no defence whatever from the mere fact that, at the time when the unlawful arrest took place, the *Habeas Corpus* Act was, partially at any rate, not in force. It is however almost certain that when the suspension of the *Habeas Corpus* Act makes it possible for the government to keep suspected persons in prison for a length of time

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without bringing them to trial, a smaller or greater number of unlawful acts will be committed, if not by the members of the Ministry themselves, at any rate by their agents. We may even go further than this, and say that the unavowed object of a *Habeas Corpus* Suspension Act is to enable the government to do acts which, though politically expedient, may not be strictly legal. The Parliament which destroys one of the main guarantees for individual freedom must hold, whether wisely or not, that a crisis has arisen when the rights of individuals must be postponed to considerations of state. A Suspension Act would, in fact, fail of its main object, unless officials felt assured that, as long as they *bonâ fide*, and uninfluenced by malice or by corrupt motives, carried out the policy of which the Act was the visible sign, they would be protected from penalties for conduct which, though it might be technically a breach of law, was nothing more than the free exertion for the public good of that discretionary power which the suspension of the *Habeas Corpus* Act was intended to confer upon the executive. This assurance is derived from the expectation that, before the Suspension Act ceases to be in force, Parliament will pass an Act of Indemnity, protecting all persons who have acted, or have intended to act, under the powers given to the government by the statute. This expectation has not been disappointed. An Act suspending the *Habeas Corpus* Act, which has been continued for any length of time, has constantly been followed by an Act of Indemnity. Thus the Act to which reference has already been made, 34 Geo. III. c. 54, was continued in force by successive annual

re-enactments for seven years, from 1794 to 1801. In the latter year an Act was passed, 41 Geo. III. cap. 66, "indemnifying such persons as since the first "day of February, 1793, have acted in the apprehend- "ing, imprisoning, or detaining in custody in Great "Britain of persons suspected of high treason or "treasonable practices." It cannot be disputed that the so-called suspension of the *Habeas Corpus* Act, which every one knows will probably be followed by an Act of Indemnity, is, in reality, a far greater interference with personal freedom than would appear from the very limited effect, in a merely legal point of view, of suspending the right of persons accused of treason to demand a speedy trial. The Suspension Act, coupled with the prospect of an Indemnity Act, does in truth arm the executive with arbitrary powers. Still there are one or two considerations which limit the practical importance which can fairly be given to an expected Act of Indemnity. The relief to be obtained from it is prospective and uncertain. Any suspicion on the part of the public, that officials had grossly abused their powers, might make it difficult to obtain a Parliamentary indemnity for things done while the *Habeas Corpus* Act was suspended. As regards, again, the protection to be derived from the Act by men who have been guilty of irregular, illegal, oppressive, or cruel conduct, everything depends on the terms of the Act of Indemnity. These may be either narrow or wide. The Indemnity Act, for instance, of 1801, gives a very limited amount of protection to official wrongdoers. It provides indeed a defence against actions or prosecutions in respect of anything done, commanded, ordered, directed, or

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CHAPTER VI

THE RIGHT TO FREEDOM OF DISCUSSION

Chapter VI.

Freedom of discussion.

THE Declaration of the Rights of Man[1] and the French Constitution of 1791 proclaim freedom of discussion and the liberty of the press in terms which are still cited in text-books[2] as embodying maxims of French jurisprudence.

Principles laid down in foreign constitution.

"*La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, ...imer librement, sauf à répondre de l'abus de ...liberté dans les cas déterminés par la loi.*"[3]

...a constitution garantit, comme droit naturel et ... la liberté à tout homme de parler, d'écrire, ...rimer et publier ses pensées, sans que ses écrits ...nt être soumis à aucune censure ou inspection ... leur publication."[4]

...gian law, again, treats the liberty of the press ... damental article of the constitution.

...rt. 18. *La presse est libre; la censure ne*

...ard, *Les Constitutions Françaises*, p. 16.
...rguignon, *Éléments Généraux de Législation Française*, p. 468.
...ar. *des droits*, art. 11, Plouard, p. 16.
...*titution de* 1791, *Tit.* 1; Plouard, *Constitutions Françaises*,

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"*pourra jamais être établie: il ne peut être* [illegible]
"*de cautionnement des écrivains, éditeurs ou* [illegible]
"*primeurs.*

"*Lorsque l'auteur est connu et domicilié en* [illegible]
"*gique, l'éditeur, l'imprimeur ou le distributeur* [illegible]
"*peut être poursuivi.*"[1]

No principle of freedom of discussion recognised by English law.

Both the revolutionists of France and the [illegible] stitutionalists of Belgium borrowed their ideas [illegible] freedom of opinion and the liberty of the press [illegible] England, and most persons form such loose no[illegible] as to English law that the idea prevails in En[illegible] itself that the right to the free expression of op[illegible] and especially that form of it which is known a[illegible] "liberty of the press," are fundamental doctri[illegible] the law of England in the same sense in which [illegible] were part of the ephemeral constitution of 179[illegible] still are embodied in the articles of the existing B[illegible] constitution; and, further, that our Courts rec[illegible] the right of every man to say and write wh[illegible] pleases, especially on social, political, or r[illegible] topics, without fear of legal penalties. Y[illegible] notion, justified though it be, to a certain [illegible] by the habits of modern English life, is esse[illegible] false, and conceals from students the real attit[illegible] English law towards what is called "freed[illegible] thought," and is more accurately described [illegible] "right to the free expression of opinion." A[illegible] lawyer knows, the phrases "freedom of discu[illegible] or "liberty of the press" are not to be found [illegible] part of the statute-book nor among the maxim[illegible] common law. As terms of art they are inde[illegible] unknown to our Courts. At no time has t[illegible]

[1] *Constitution de la Belgique*, art. 18.

England been any proclamation of the right to liberty of thought or to freedom of speech. The true state of things cannot be better described than in these words from an excellent treatise on the law of libel:—

English law only secures that no one shall be punished except for statements proved to be breach of law.

"Our present law permits any one to say, write, and publish what he pleases; but if he make a bad use of this liberty, he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment."[1]

A man may therefore say or write whatever he pleases, subject to the risk of, it may be, severe punishment if he publishes any statement (either by word of mouth, in writing, or in print) which he is not legally entitled to make. Nor is the law of England specially favourable to free speech or to free writing in the rules which it maintains in theory and often enforces in fact as to the kind of statements which a man has a legal right to make. Above all, it recognises no special privilege on behalf of the "press," if by that term we mean, in conformity with ordinary language, periodical literature in general, and particularly the newspapers. In truth there is nothing or scarcely anything in the statute-book which can be called a "press law."[2] The law of the press as it exists here is merely part of the

[1] Odgers, *Libel and Slander*, Introd. (1st ed.), p. 12.

[2] For exceptions to this, see *e.g.* 8 & 9 Vict. c. 75; 44 & 45 Vict. c. 60, s. 2.

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law of libel, and it is well worth while to trace out with some care the restrictions imposed by the law of libel on the "freedom of the press;" by which expression I mean a person's right to make any statement he likes in books or newspapers.

Libels on individuals.

There are many statements with regard to individuals which no man is entitled to publish in writing or print. It is a libel (speaking generally) to circulate any untrue statement about another which is calculated to injure his interests, character, or reputation. Every man who directly or indirectly makes known or, as the technical expression goes, "publishes" such a statement, gives currency to a libel and is liable to an action for damages. A person who makes a defamatory statement authorises its publication in writing, the person who writes, the publisher who brings out for sale, the printer who prints, the vendor who distributes a libel, are each guilty of publication, and may each severally be sued. The gist of the offence being the making public, not the writing of the libel, the person who having read a libel sends it on to a friend, is a libeller; and it would seem that a man who reads aloud a libel, knowing it to be such, may be sued. This separate liability of each person concerned in a wrongful act is, as already pointed out, a very noticeable characteristic of our law. Honest belief moreover, and good intentions on the part of a libeller, are no legal defence for his conduct. Nor will it avail him to show that he had good reason for thinking the false statement which he made to be true. Persons often must pay heavy damages for giving currency to statements which were not meant to be falsehoods.

and which were reasonably believed to be true. Thus it is libellous to publish of a man who has been convicted of felony but has worked out his sentence that he "is a convicted felon." It is a libel on the part of *X* if *X* publishes that *B* has told him that *A*'s bank has stopped payment, if, though *B* in fact made the statement to *X*, and *X* believed the report to be true, it turns out to be false. Nor, again, are expressions of opinion when injurious to another at all certain not to expose the publisher of them to an action. A "fair" criticism, it is often said, is not libellous; but it would be a grave mistake to suppose that critics, either in the press or elsewhere, have a right to publish whatever criticisms they think true. Every one has a right to publish fair and candid criticism. But "a critic must confine himself to criticism, and "not make it the veil for personal censure, nor allow "himself to run into reckless and unfair attacks merely "from the love of exercising his power of denuncia-"tion."[1] A writer in the press and an artist or actor whose performances are criticised are apt to draw the line between "candid criticism" and "personal censure" at very different points. And when on this matter there is a difference of opinion between a critic and his victim, the delicate question what is meant by fairness has to be determined by a jury, and may be so answered as greatly to curtail the free expression of critical judgments. Nor let it be supposed that the mere "truth" of a statement is of itself sufficient to protect the person who publishes it from liability to punishment. For though the fact that an assertion is true is an answer to an action for libel, a person

[1] See Odgers, *Libel and Slander*, (1st ed.), p. 38.

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may be criminally punished for publishing statements which, though perfectly true, damage an individual without being of any benefit to the public. To write for example and with truth of *A* that he many years ago committed acts of immorality may very well expose the writer *X* to criminal proceedings, and *X* if put on his trial will be bound to prove not only that *A* was in fact guilty of the faults imputed to him, but also that the public had an interest in the knowledge of *A*'s misconduct. If *X* cannot show this, he will find that no supposed right of free discussion or respect for liberty of the press will before an English judge save him from being found guilty of a misdemeanour and sent to prison.

Libels on government.

So far in very general terms of the limits placed by the law of libel on freedom of discussion as regards the character of individuals. Let us now observe for a moment the way in which the law of libel restricts in theory at least the right to criticise the conduct of the government.

Every person commits a misdemeanour who publishes (verbally or otherwise) any words or any document with a seditious intention. Now a seditious intention means an intention to bring into hatred or contempt or to excite disaffection against the Queen or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or the administration of justice, or to excite British subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to promote feelings of illwill and hostility between different classes.[1] And

[1] See Stephen, *Digest of the Criminal Law*, arts. 91, 92, and note also art. 95 as to spreading false news.

if the matter published is contained in a written or printed document the publisher is guilty of publishing a seditious libel. The law, it is true, permits the publication of statements meant only to show that the Crown has been misled, or that the government has committed errors, or to point out defects in the government or the constitution with a view to their legal remedy, or with a view to recommend alterations in Church or State by legal means, and, in short, sanctions criticism on public affairs which is *bonâ fide* intended to recommend the reform of existing institutions by legal methods. But any one will see at once that the legal definition of a seditious libel might easily be so used as to check a great deal of what is ordinarily considered allowable discussion, and would if rigidly enforced be inconsistent with prevailing forms of political agitation.

Expression of opinion on religious or moral questions.

The case is pretty much the same as regards the free expression of opinion on religious or moral questions.[1] Recent circumstances have recalled attention to the forgotten law of blasphemy. But it surprises most persons to learn that, on one view of the law, any one who publishes a denial of the truth of Christianity in general or of the existence of God, whether the terms of such publication are decent or otherwise, commits the misdemeanour of publishing a blasphemous libel and is liable to imprisonment; that, according to another view of the law, any one is guilty of publishing a blasphemous libel who publishes matter relating to God, Jesus Christ, or the Book of Common Prayer intended to wound the feelings of mankind, or to excite contempt against the Church

[1] See Stephen, *Digest of the Criminal Law*, ss. 161-164.

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by law established, or to promote immorality; and that it is at least open to grave doubt how far the publications which thus wound the feelings of mankind are exempt from the character of blasphemy because they are intended in good faith to propagate opinions which the person who publishes them regards as true.[1] Most persons, again, are astonished to find that the denial of the truth of Christianity or of the authority of the Scriptures, by "writing, printing, teaching, or advised speaking" on the part of any person who has been educated in or made profession of Christianity in England, is by statute a criminal offence entailing very severe penalties.[2] When once, however, the principles of the common law and the force of the enactments still contained in the statute-book are really appreciated, no one can maintain that the law of England recognises anything like that natural right to the free communication of thoughts and opinions which was proclaimed in France nearly a hundred years ago to be one of the most valuable Rights of Man. It is quite clear, further, that the effect of English law, whether as regards statements made about individuals, or the expression of opinion about public affairs, or speculative matters, depends wholly upon the answer to the question who are to determine whether a given publication is or is not a libel. The reply (as we all know) is, that in substance

[1] See especially Stephen, *Digest of the Criminal Law*, art. 161, for two different expositions of the nature of "blasphemy" as a legal offence.

[2] See 9 & 10 Will. III. c. 35, as altered by 53 Geo. III. c. 160, and Stephen's *Digest of the Criminal Law*, art. 163. Conf. *Attorney-General* v. *Bradlaugh*, 14 Q. B. D. (C. A.), 667, p. 719, Judgment of Lindley, L. J.

this matter is referred to the decision of a jury. Whether in any given case a particular individual is to be convicted of libel depends wholly upon their judgment, and they have to determine the questions of truth, fairness, intention and the like, which affect the legal character of a published statement.[1]

Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written. Such "liberty" may vary at different times and seasons from unrestricted license to very severe restraint, and the experience of English history during the last two centuries shows that under the law of libel the amount of latitude conceded to the expression of opinion has in fact differed greatly according to the condition of popular sentiment. Until very recent times the law, moreover, has not recognised any privilege on the part of the press. A statement which is defamatory or blasphemous, if made in a letter or upon a card, has exactly the same character if made in a book or a newspaper. The protection given by the Belgian constitution to the editor, printer, or seller of a newspaper involves a recognition of special rights on the part of persons connected with the press which is quite inconsistent with the general theory of English law. It is hardly an exaggeration

[1] "The truth of the matter is very simple when stripped of all "ornaments of speech, and a man of plain common sense may easily "understand it. It is neither more nor less than this: that a man may "publish anything which twelve of his countrymen think is not blam-"able, but that he ought to be punished if he publishes that which is "blamable [*i.e.* that which twelve of his countrymen think is blam-"able]. This in plain common sense is the substance of all that has "been said on the matter."—*Rex* v. *Cutbill*, 27 St. Tr. 642, 675.

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to say, from this point of view, that liberty of the press is not recognised in England.

Why the liberty of the press has been thought peculiar to England.

Why then has the liberty of the press been long reputed as a special feature of English institutions?

The answer to this inquiry is, that for about two centuries the relation between the government and the press has in England been marked by all those characteristics which make up what we have termed the "rule" or "supremacy" of law, and that just because of this, and not because of any favour shown by the law of England towards freedom of discussion, the press, and especially the newspaper press, has practically enjoyed with us a freedom which till recent years was unknown in continental states. Any one will see that this is so who examines carefully the situation of the press in modern England, and then contrasts it either with the press law of France or with the legal condition of the press in England during the sixteenth and seventeenth centuries.

The present position of the English press is marked by two features.

The position of the press in modern England. No censorship.

First. "The liberty of the press," says Lord "Mansfield, "consists in printing without any pre- "vious license, subject to the consequences of law."[1] "The law of England," says Lord Ellenborough, "is "a law of liberty, and consistently with this liberty "we have not what is called an *imprimatur*; there is "no such preliminary license necessary; but if a man "publish a paper, he is exposed to the penal conse- "quences, as he is in every other act, if it be illegal."[2]

[1] *Rex* v. *Dean of St. Asaph*, 3 T. R. 431 (note).

[2] *Rex* v. *Cobbett*, 29 St. Tr. 49; see Odgers, *Libel and Slander* (1st ed.), p. 10.

These dicta show us at once that the so-called liberty of the press is a mere application of the general principle, that no man is punishable except for a distinct breach of the law.[1] This principle is radically inconsistent with any scheme of license or censorship by which a man is hindered from writing or printing anything which he thinks fit, and is hard to reconcile even with the right on the part of the Courts to restrain the circulation of a libel, until at any rate the publisher has been convicted of publishing it. It is also opposed in spirit to any regulation requiring from the publisher of an intended newspaper a preliminary deposit of a certain sum of money, for the sake either of ensuring that newspapers should be published only by solvent persons, or that if a newspaper should contain libels there shall be a certainty of obtaining damages from the proprietor. No sensible person will argue that to demand a deposit from the owner of a newspaper or to impose other limitations upon the right of publishing periodicals is of necessity inexpedient or unjust. All that is here insisted upon is, that such checks and preventive measures are inconsistent with the pervading principle of English law, that men are to be interfered with or punished, not because they may or will break the law, but only when they have committed some definite assignable legal offence. Hence, with one exception,[2] which is a quaint survival from a different system, no such thing is known with us as a license to print, or a censorship either

[1] See p. 175, *ante*.

[2] *i.e.* the licensing of plays. See 6 & 7 Vict. c. 68; Stephen, *Commentaries*, iii. p. 202.

Part II. of the press or of political newspapers. Neither the government nor any other authority has the right to seize or destroy the stock of a publisher because it consists of books, pamphlets, or papers which in the opinion of the government contain seditious or libellous matter. Indeed, it is questionable how far the Courts themselves will, even for the sake of protecting an individual from injury, prohibit the publication or republication of a libel, or restrain its sale until the matter has gone before a jury and it has been established by their verdict that the words complained of are libellous.[1] Writers in the press are in short, like every other person, subject to the law of the realm, and nothing else. Neither the government nor the Courts have (speaking generally) any greater power to prevent or oversee the publication of a newspaper than the writing of a letter. Indeed, the simplest way of setting forth briefly the position of writers in the press is to say that they stand in substantially the same position as letter-writers. A man who scribbles blasphemy on a gate[2] and a man who prints blasphemy in a paper or in a book commit exactly the same offence, and are dealt with in England on exactly the same principles. Hence also writers in newspapers have, or had until very recently, no special privilege protecting them from liability. Look at the matter which way you will, the main feature of liberty of the press as understood in England is that the press (which means of course the writers in it) is subject only to the ordinary law of the land.

[1] *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; *Saxby* v. *Easterbrook*, 3 C. P. D. 339; Odgers, *Libel and Slander* (1st ed.), pp. 13-16.

[2] *Reg.* v. *Pooley*, cited Stephen, *Digest of Criminal Law*, art. 161.

Press offences dealt with by ordinary Courts.

Secondly. Press offences, in so far as the term can be used with reference to English law, are tried and punished only by the ordinary Courts of the country, that is, by a judge and jury.[1]

Since the Restoration,[2] offences committed through the newspapers, or, in other words, the publication therein of libels whether defamatory, seditious, or blasphemous, have never been tried by any special tribunal. Nothing to Englishmen seems more a matter of course than this. Yet nothing has in reality contributed so much to free the periodical press from any control. If the criterion whether a publication be libellous is the opinion of a jury, and a man may publish anything which twelve of his countrymen think is not blamable, it is impossible that the Crown or the Ministry should exert any stringent control over writings in the press, unless (as indeed may sometimes happen) the majority of ordinary citizens are entirely opposed to attacks on the government. The times when persons in power wish to check the excesses of public writers are times at which a large body of opinion or sentiment is hostile to the executive. But under these circumstances it must, from the nature of things, be at least an even chance that the jury called upon to find a publisher guilty of printing seditious libels sympathise with the language which the officers

[1] The existence, however, of process by criminal information, and the rule that truth was no justification, had the result that during the eighteenth century seditious libel rose almost to the rank of a press offence, to be dealt with, if not by separate tribunals, at any rate by special rules with a special procedure.

[2] See, as to the state of the press under the Commonwealth, Masson, *Life of Milton*, iii. pp. 265-297. Substantially the possibility of trying press offences by special tribunals was put an end to by the abolition of the Star Chamber in 1641, 16 Car. I. cap. 10.

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of the Crown deem worthy of punishment, and hence may hold censures which are prosecuted as libels to be fair and laudable criticism of official errors. Whether the control indirectly exercised over the expression of opinion by the verdict of twelve commonplace Englishmen is at the present day certain to be as great a protection to the free expression of opinion even in political matters as it proved a century ago, when the sentiment of the governing body was different from the prevalent feeling of the class from which jurymen were chosen, is an interesting speculation into which there is no need to enter. What is certain is, that the practical freedom of the English press arose in great measure from the trial with us of "press offences," like every other kind of libel, by a jury.

The liberty of the press then is in England simply one result of the universal predominance of the law of the land. The terms "liberty of the press," "press offences," "censorship of the press," and the like, are all unknown to English lawyers, simply because any offence which can be committed through the press is some form of libel, and is governed in substance by the ordinary law of defamation.

These things seem to us at the present day so natural as hardly to be noticeable; let us, however, glance as I have suggested at the press law of France, both before and since the Revolution; and also at the condition of the press in England, up to nearly the end of the seventeenth century. Such a survey will prove to us that the treatment in modern England of offences committed through the newspapers affords an example, as singular as it is striking, of the legal

spirit which now pervades every part of the English constitution.

Comparison with the press law of France.

An Englishman who consults French authorities is struck with amazement at two facts. The press law[1] has long constituted and still constitutes to a certain extent a special department of French legislation, and press offences have been, under every form of government which has existed in France, a more or less special class of crimes. The Acts which have been passed in England with regard to the press since the days of Queen Elizabeth do not in number equal one-tenth, or even one-twentieth, of the laws enacted during the same period on the same subject in France. The contrast becomes still more marked if we compare the state of things in the two countries since the beginning of the eighteenth century, and (for the sake of avoiding exaggeration) put the laws passed since that date, and which were till 1881 in force in France, against every Act which, whether repealed or unrepealed, has been passed in England since the year 1700. It will be found that the French press code consisted till long after the establishment

[1] The press is now governed in France wholly by the *Loi sur la liberté de la presse*, 29-30 *Juill.* 1881; D. P. 1881, iv. 65. This law repeals all earlier edicts, decrees, laws, ordinances, etc., on the subject. Immediately before this law was passed there were in force more than thirty enactments regulating the position of the French press and inflicting penalties on offences which could be committed by writers in the press; and the three hundred and odd closely printed pages of Dalloz treating of laws on the press showed that the enactments then in vigour under the Republic were as nothing compared to the whole mass of regulations, ordinances, decrees, and laws which, since the earliest days of printing down to the year 1881, have been issued by French rulers with the object of controlling the literary expression of opinion and thought. See Dalloz, *Répertoire*, vol. xxxvi., "*Presse*," pp. 384-776, and especially Tit. I. chap. i., Tit. II. chap. iv.; Roger et Sorel, *Codes et Lois Usuelles*, "*Presse*," 637-651.

Part II. of the present Republic of over thirty enactments, whilst the English Acts about the press passed since the beginning of the last century do not exceed a dozen, and, moreover, have gone very little way towards touching the freedom of writers.

The ground of this difference lies in the opposite views taken in the two countries of the proper relation of the state to literature, or, more strictly, to the expression of opinion in print.

In England the doctrine has since 1700 in substance prevailed that the government has nothing to do with the guidance of opinion, and that the sole duty of the state is to punish libels of all kinds, whether they are expressed in writing or in print. Hence the government has (speaking generally) exercised no special control over literature, and the law of the press, in so far as it can be said to have existed, has been nothing else than a branch or an application of the law of libel.

In France, literature has for centuries been considered as the particular concern of the state. The prevailing doctrine, as may be gathered from the current of French legislation, has been, and still to a certain extent is, that it is the function of the administration not only to punish defamation, slander, or blasphemy, but to guide the course of opinion, or, at any rate, to adopt preventive measures for guarding against the propagation in print of unsound or dangerous doctrines. Hence the huge amount and the special and repressive character of the press laws which have existed in France.

Up to the time of the Revolution the whole literature of the country was avowedly controlled by the

state. The right to print or sell books and printed publications of any kind was treated as a special privilege or monopoly of certain libraries; the regulations (*règlements*) of 1723 (some part of which was till quite recently in force[1]) and of 1767 confined the right of sale and printing under the severest penalties to librarians who were duly licensed.[2] The right to publish, again, was submitted to the strictest censorship, exercised partly by the University (an entirely ecclesiastical body), partly by the Parliaments, partly by the Crown. The penalties of death, of the galleys, of the pillory, were from time to time imposed upon the printing or sale of forbidden works. These punishments were often evaded; but they after all retained practical force till the very eve of the Revolution. The most celebrated literary works of France were published abroad. Montesquieu's *Esprit des Lois* appeared at Geneva. Voltaire's *Henriade* was printed in England; the most remarkable of his and of Rousseau's writings were published in London, in Geneva, or in Amsterdam. In 1775 a work entitled *Philosophie de la Nature* was destroyed by the order of the Parliament of Paris, the author was decreed guilty of treason against God and man, and would have been burnt if he could have been arrested. In 1781, eight years before the meeting of the States General, Raynal was pronounced by the Parliament guilty of blasphemy on account of his *Histoire des Indes*.[3] The point, however, to remark is, not so much the severity of the punishments which under

[1] See Dalloz, *Répertoire*, vol. xxxvi., "*Presse*," Tit. I. chap. i. Compare Roger et Sorel, *Codes et Lois*, "*Presse*," pp. 637-651.

[2] *Ibid.*

[3] *Ibid.*

Part II. the *Ancien Régime* were intended to suppress the expression of heterodox or false beliefs, as the strict maintenance down to 1789 of the right and duty of the state to guide the literature of the country. It should further be noted that down to that date the government made no marked distinction between periodical and other literature. When the *Lettres Philosophiques* could be burnt by the hangman, when the publication of the *Henriade* and the *Encyclopédie* depended on the goodwill of the King, there was no need for establishing special restrictions on newspapers. The daily or weekly press, moreover, hardly existed in France till the opening of the States General.[1]

The Revolution (it may be fancied) put an end to restraints upon the press. The Declaration of the Rights of Man proclaimed the right of every citizen to publish and print his opinions, and the language has been cited[2] in which the Constitution of 1791 guaranteed to every man the natural right of speaking, printing, and publishing his thoughts without having his writings submitted to any censorship or inspection prior to publication. But the Declaration of Rights and this guarantee were practically worthless. They enounced a theory which for many years was utterly opposed to the practice of every French government.

The Convention did not establish a censorship, but under the plea of preventing the circulation of seditious works it passed the law of 29th March 1793, which silenced all free expression of opinion. The

[1] See Rocquain, *L'Esprit Révolutionnaire avant la Révolution*, for a complete list of "*Livres Condamnés*" from 1715-1789. Rocquain's book is full of information on the arbitrariness of the French Government during the reigns of Louis XV and Louis XVI.

[2] See p. 223, *ante*.

Directory imitated the Convention. Under the First Empire the newspaper press became the property of the government, and the sale, printing, and publication of books was wholly submitted to imperial control and censorship.[1]

The years which elapsed from 1789 to 1815 were, it may be suggested, a revolutionary era which provoked or excused exceptional measures of state interference. Any one, however, who wants to see how consonant to the ideas which have permanently governed French law and French habits is the notion that the administration should by some means keep its hand on the national literature of the country, ought to note with care the course of legislation from the Restoration to the present day. The attempt indeed to control the publication of books has been by slow degrees given up; but one government after another has, with curious uniformity, proclaimed the freedom and ensured the subjection of the newspaper press. Between 1814 and 1830 the censorship was established (21st Oct. 1814), was partially abolished, was re-extended (1817), was re-abolished (1819), was re-established and extended (1820), and was re-abolished (1828). In 1830 the Charter made the abolition of the censorship part of the constitution, and since that date no system of censorship has been in name re-established. But as regards newspapers, the celebrated decree of 17th February 1852 enacted restrictions more rigid than anything imposed under the name of *la censure* by any government since the fall of Napoleon I. The government took to itself under this law, in addition to other discretionary

[1] Dalloz, *Répertoire*, xxxvi., "*Presse*," Tit. I. chap. i.

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powers, the right to suppress any newspaper without the necessity of proving the commission of any crime or offence by the owner of the paper or by any writer in its columns.[1] No one, further, could under this decree set up a paper without official authorisation. Nor have different forms of the censorship been the sole restrictions imposed in France on the liberty of the press. The combined operation of enactments passed during the existence of the Republic of 1848, and under the Empire, was (among other things) to make the signature of newspaper articles by their authors compulsory,[2] to require a large deposit from any person who wished to establish a paper,[3] to withdraw all press offences whatever from the cognisance of a jury,[4] to re-establish or reaffirm the provision contained in the *réglement* of 1723 by which no one could carry on the trade of a librarian or printer (*commerce de la librairie*) without a license. It may in fact be said with substantial truth that between 1852 and 1870 the newspapers of France were as much controlled by the government as was every kind of literature before 1789, and that the Second Empire exhibited a retrogression towards the despotic principles of the *Ancien Régime*. The Republic,[5] it

[1] Décret, 17 Février, 1852, sec. 32, Roger et Sorel, *Codes et Lois* p. 648.

[2] Roger et Sorel, *Codes et Lois*, p. 646. Lois, 16 Juillet 1850.

[3] *Ibid.* [4] Lois, 31 Déc. 1851.

[5] One thing is perfectly clear and deserves notice. The legislation of the existing Republic was not till 1881, any more than that of the Restoration or the Empire, based on the view of the press which pervades the modern law of England. "Press law" still formed a special department of the law of France. "Press offences" were a particular class of crimes, and there were at least two provisions, and probably several more, to be found in French laws which conflicted with the doctrine of the liberty of the press as understood in England.

is true, has recently abolished the restraints on the liberty of the press which grew up both before and under the Empire. But though for the last few years the ruling powers in France have favoured the liberty or license of the press, nothing is more plain than that until quite recently the idea that press offences were a peculiar class of offences to be dealt with in a special way and punished by special courts was accepted by every party in France. This is a matter of extreme theoretical importance. It shows how foreign to French notions is the idea that every breach of law ought to be dealt with by the ordinary law of the land. Even a cursory survey (and no other is possible in these lectures) of French legislation with regard to literature proves then that from the time when the press came into existence up to almost the present date the idea has held ground that the state as represented by the executive ought to direct or control the expression of opinion, and that this control has been exercised by an official censorship—by restrictions on the right to print or sell books—and by the subjection of press offences to special laws administered by special tribunals. The occasional relaxation of these restrictions is of import-

A law passed under the Republic (6th July 1871. Roger et Sorel, *Codes et Lois*, p. 651) reimposed on the proprietors of newspapers the necessity of making a large deposit, with the proper authorities, as a security for the payment of fines or damages incurred in the course of the management of the paper. A still later law (29th December 1875, s. 5. Roger et Sorel, *Codes et Lois*, p. 651), while it submitted some press offences to the judgment of a jury, subjected others to the cognisance of Courts of which a jury formed no part. Recent French legislation exhibits no doubt a violent reaction against all attempts to check the freedom of the press, but in its very effort to secure this freedom betrays the existence of the notion that offences committed through the press require in some sort exceptional treatment.

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ance. But their recurring revival is of far more significance than their temporary abolition.

Contrast with position of press in England during seventeenth century.

Let us now turn to the position of the English press during the sixteenth and seventeenth centuries.

The Crown originally held all presses in its own hands, allowed no one to print except under special license, and kept all presses subject to regulations put forward by the Star Chamber in virtue of the royal prerogative: the exclusive privilege of printing was thus given to ninety-seven London stationers and their successors, who, as the Stationers' Company, constituted a guild with power to seize all publications issued by outsiders; the printing-presses ultimately conceded to the Universities existed only by a decree of the Star Chamber.

Side by side with the restrictions on printing—which appear to have more or less broken down—there grew up a system of licensing which constituted a true censorship.[1]

Press offences constituted a special class of crimes cognisable by a special tribunal—the Star Chamber—which sat without a jury and administered severe punishments.[2] The Star Chamber indeed fell in 1641, never to be revived, but the censorship survived the Commonwealth, and was under the Restoration (1662) given a strictly legal foundation by the statute 13 & 14 Car. II. cap. 33, which by subsequent enactments was kept in force till 1695.[3]

[1] See for the control exercised over the press down to the Restoration, Odgers, *Libel and Slander* (1st ed.), pp. 10, 11.

[2] Gardiner, *History of England*, vii. pp. 51, 130; *Ibid.*, viii. pp. 225, 234.

[3] See Macaulay, *History of England*, iv. chaps. xix. xxi.

Original likeness and subsequent unlikeness between press law of England and of France.

There existed, in short, in England during the sixteenth and seventeenth centuries every method of curbing the press which was then practised in France, and which has prevailed there almost up to the present day. In England, as on the Continent, the book trade was a monopoly, the censorship was in full vigour, the offences of authors and printers were treated as special crimes and severely punished by special tribunals. This similarity or identity of the principles with regard to the treatment of literature originally upheld by the government of England and by the government of France is striking. It is rendered still more startling by the contrast between the subsequent history of legislation in the two countries. In France (as we have already seen) the censorship, though frequently abolished, has almost as frequently been restored. In England the system of licensing, which was the censorship under another name, was terminated rather than abolished in 1695. The House of Commons, which refused to continue the Licensing Act, was certainly not imbued with any settled enthusiasm for liberty of thought. The English statesmen of 1695 neither avowed nor entertained the belief that the "free communication of "thoughts and opinions was one of the most valuable "of the rights of man."[1] They refused to renew the Licensing Act, and thus established freedom of the press without any knowledge of the importance of what they were doing. This can be asserted with confidence, for the Commons delivered to the Lords a document which contains the reasons for their refusing to renew the Act.

[1] See *Declaration of the Rights of Man*, art. 11, p. 223, *ante*.

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"This paper completely vindicates the resolution "to which the Commons had come. But it proves at "the same time that they knew not what they were "doing, what a revolution they were making, what a "power they were calling into existence. They pointed "out concisely, clearly, forcibly, and sometimes with a "grave irony which is not unbecoming, the absurdities "and iniquities of the statute which was about to "expire. But all their objections will be found to "relate to matters of detail. On the great question of "principle, on the question whether the liberty of un-"licensed printing be, on the whole, a blessing or a "curse to society, not a word is said. The Licensing "Act is condemned, not as a thing essentially evil, but "on account of the petty grievances, the exactions, the "jobs, the commercial restrictions, the domiciliary visits "which were incidental to it. It is pronounced mis-"chievous because it enables the Company of Stationers "to extort money from publishers, because it empowers "the agents of the government to search houses under "the authority of general warrants, because it confines "the foreign book trade to the port of London; because "it detains valuable packages of books at the Custom "House till the pages are mildewed. The Commons "complain that the amount of the fee which the licenser "may demand is not fixed. They complain that it is "made penal in an officer of the Customs to open a box "of books from abroad, except in the presence of one of "the censors of the press. How, it is very sensibly asked, "is the officer to know that there are books in the box "till he has opened it? Such were the arguments which "did what Milton's Areopagitica had failed to do."[1]

[1] Macaulay, *History of England*, iv. pp. 541, 542.

How slight was the hold of the principle of the liberty of the press on the statesmen who abolished the censorship is proved by their entertaining, two years later, a bill (which, however, never passed) to prohibit the unlicensed publication of news.[1] Yet while the solemn declaration by the National Assembly of 1789 of the right to the free expression of thought remained a dead letter, or at best a speculative maxim of French jurisprudence which, though not without influence, was constantly broken in upon by the actual law of France, the refusal of the English Parliament in 1695 to renew the Licensing Act did permanently establish the freedom of the press in England. The fifty years which followed were a period of revolutionary disquiet fairly comparable with the era of the Restoration in France. But the censorship once abolished in England was never revived, and all idea of restrictions on the liberty of the press other than those contained in the law of libel have been so long unknown to Englishmen, that the rare survivals in our law of the notion that literature ought to be controlled by the state appear to most persons inexplicable anomalies, and are tolerated only because they produce so little inconvenience that their existence is forgotten.

Questions suggested by original similarity and final difference between press law of France and of England.

To a student who surveys the history of the liberty of the press in France and in England two questions suggest themselves. How does it happen that down to the end of the seventeenth century the principles upheld by the Crown in each country were in substance the same? What, again, is the explanation of the fact that from the beginning of the eighteenth

[1] Macaulay, *History of England*, iv. pp. 771, 772.

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century the principles governing the law of the press in the two countries have been, as they still continue to be, essentially different? The similarity and the difference each seems at first sight equally perplexing. Yet both one and the other admit of explanation, and the solution of an apparent paradox is worth giving because of its close bearing on the subject of this lecture, namely, the predominance of the spirit of legality which distinguishes the law of the constitution.

Reasons for original similarity.

The ground of the similarity between the press law of England and of France from the beginning of the sixteenth till the beginning of the eighteenth century, is that the governments, if not the people, of each country were during that period influenced by very similar administrative notions and by similar ideas as to the relation between the state and individuals.[1] In England again, as in every European country, the belief prevailed that a King was responsible for the religious belief of his subjects. This responsibility involves the necessity for regulating the utterance and formation of opinion. But this direction or control cannot be exercised without governmental interference with that liberty of the press which is at bottom the right of every man to print any opinion which he chooses to propagate, subject only to risk of punishment if his expressions contravene some distinct legal maxim. During the sixteenth and seventeenth centuries, in short, the Crown was in England, as in France, extending its administrative powers; the Crown was in England, as in France, entitled, or rather required by public

[1] See chap. xii. *post.*

opinion, to treat the control of literature as an affair of state. Similar circumstances produced similar results; in each country the same principles prevailed; in each country the treatment of the press assumed therefore a similar character.

Reasons for later dissimilarity.

The reason, again, why, for nearly two centuries, the press has been treated in France on principles utterly different from those which have been accepted in England, lies deep in the difference of the spirit which has governed the customs and laws of the two countries.

In France the idea has always flourished that the government, whether Royal, Imperial, or Republican, possesses, as representing the state, rights and powers as against individuals superior to and independent of the ordinary law of the land. This is the real basis of that whole theory of a *droit administratif*,[1] which it is so hard for Englishmen fully to understand. The increase, moreover, in the authority of the central government has at most periods both before and since the Revolution been, or appeared to most Frenchmen to be, the means of removing evils which oppressed the mass of the people. The nation has in general looked upon the authority of the state with the same favour with which Englishmen during the sixteenth century regarded the prerogative of the Crown. The control exercised in different forms by the executive over literature has therefore in the main fully harmonised with the other institutions of France. The existence, moreover, of an elaborate administrative system, the action of which has never been subject to the control of the ordinary tribunals, has always

[1] See chap. xii. *post*.

Part II. placed in the hands of whatever power was supreme in France the means of enforcing official surveillance of literature. Hence the censorship (to speak of no other modes of checking the liberty of the press) has been on the whole in keeping with the general action of French governments and with the average sentiment of the nation, whilst there has never been wanting appropriate machinery by which to carry the censorship into effect.

No doubt there were heard throughout the eighteenth century, and have been heard ever since, vigorous protests against the censorship, as against other forms of administrative arbitrariness; and at the beginning of the Great Revolution, as at other periods since, efforts were made in favour of free discussion. Hence flowed the abolition of the censorship, but this attempt to limit the powers of the government in one particular direction was quite out of harmony with the general reverence for the authority of the state. As long, moreover, as the whole scheme of French administration was left in force, the government, in whatever hands it was placed, always retained the means of resuming its control over the press, whenever popular feeling should for a moment favour the repression of free speech. Hence arose the constantly recurring restoration of the abolished censorship or of restraints, which though not called by the unpopular name of *la censure*, were more stringent than has ever been any Licensing Act. Restrictions, in short, on what Englishmen understand by the liberty of the press have continued to exist in France and are hardly now abolished, because the exercise of preventive and discretionary authority on the part of

the executive harmonises with the general spirit of French law, and because the administrative machinery which is the creation of that spirit, has always placed (as it still places) in the hands of the executive the proper means for enforcing discretionary authority.

In England, on the other hand, the attempt made by the Crown during the sixteenth and seventeenth centuries to form a strong central administration, though it was for a time attended with success, because it met some of the needs of the age, was at bottom repugnant to the manners and traditions of the country, and even at a time when the people wished the Crown to be strong, they hardly liked the means by which the Crown exerted its strength.

Hundreds of Englishmen who hated toleration and cared little for freedom of speech, entertained a keen jealousy of arbitrary power, and a fixed determination to be ruled in accordance with the law of the land.[1] These sentiments abolished the Star Chamber in 1641, and made the re-establishment of the hated Court impossible even for the frantic loyalty of 1660. But the destruction of the Star Chamber meant much more than the abolition of an unpopular tribunal; it meant the rooting up from its foundations of the whole of the administrative system which had been erected by the Tudors and extended by the Stuarts. This overthrow of a form of administration which contradicted the legal habits of Englishmen had no direct connection with any desire for the uncontrolled expression of opinion. The Parliament which would

[1] See Selden's remarks on the illegality of the decrees of the Star Chamber, cited Gardiner, *History of England*, vii. p. 51.

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not restore the Star Chamber or the Court of High Commission passed the Licensing Act, and this statute, which in fact establishes the censorship, was, as we have seen, continued in force for some years after the Revolution. The passing, however, of the statute, though not a triumph of toleration, was a triumph of legality. The power of licensing depended henceforward, not on any idea of inherent executive authority, but on the statute law. The right of licensing was left in the hands of the government, but this power was regulated by the words of a statute; and what was of more consequence, breaches of the Act could be punished only by proceedings in the ordinary Courts. The fall of the Star Chamber deprived the executive of the means for exercising arbitrary power. Hence the refusal of the House of Commons in 1695 to continue the Licensing Act was something very different from the proclamation of freedom of thought contained in the French Declaration of Rights, or from any of the laws which have abolished the censorship in France. To abolish the right of the government to control the press, was, in England, simply to do away with an exceptional authority, which was opposed to the general tendency of the law, and the abolition was final, because the executive had already lost the means by which the control of opinion could be effectively enforced.

To sum the whole matter up, the censorship though constantly abolished has been constantly revived in France, because the exertion of discretionary powers by the government has been and still is in harmony with French laws and institutions. The abolition of the censorship was final in England,

...use the exercise of discretionary power by the Crown was inconsistent with our system of administration and with the ideas of English law. The contrast is made the more striking by the paradoxical fact that the statesmen who tried with little success to establish the liberty of the press in France really intended to proclaim freedom of opinion, whilst the statesmen who would not pass the Licensing Act, and ...by founded the liberty of the press in England, ... theories of toleration which fell far short of ...suring unrestricted liberty of discussion. This ...ntrast is not only striking in itself, but also affords ...e strongest illustration that can be found of English ...onceptions of the rule of law.

CHAPTER VII

THE RIGHT OF PUBLIC MEETING

Part II.

Right of public meeting.

THE law of Belgium[1] with regard to public meeti is contained in the nineteenth article of the consti tion, which is probably intended in the main t reproduce the law of England and runs as follows :—

Rules of Belgian constitution.

"*Art.* 19. *Les Belges ont le droit de s'assembler* "*paisiblement et sans armes, en se conformant au* "*lois, qui peuvent régler l'exercice de ce droit, sa* "*néanmoins le soumettre à une autorisation préalabl*

"*Cette disposition ne s'applique point aux ra* "*semblements en plein air, qui restent entièrement* "*soumis aux lois de police.*"[2]

Principles of English law as to right of public meeting.

The restrictions on the practice of public meeting appear to be more stringent in Belgium than in England, for the police have with us no special authority to control open-air assemblies. Yet just as it cannot with strict accuracy be asserted that English law recognises the liberty of the press, so it can hardly be said that our constitution knows of such a thing as any specific right of public meeting. No better

[1] See *Law Quarterly Review*, iv. p. 159. See also as to right of public meeting in Italy, *Ibid.*, p. 78; in France, *Ibid.*, p. 165; in Switzerland, *Ibid.*, p. 169; in United States, *Ibid.*, p. 257. See Appendix, Note 4, Questions connected with the Right of Public Meeting.

[2] *Constitution de la Belgique*, art. 19.

instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech. There is no special law allowing *A*, *B* and *C* to meet together either in the open air or elsewhere for a lawful purpose, but the right of *A* to go where he pleases so that he does not commit a trespass, and to say what he likes to *B* so that his talk is not libellous or seditious, the right of *B* to do the like, and the existence of the same rights of *C*, *D*, *E* and *F*, and so on *ad infinitum*, leads to the consequence that *B*, *C*, *D*, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner. *A* has a right to walk down the High Street or to go on to a common. *B* has the same right. *C*, *D*, and all their friends have the same right to go there also. In other words, *A*, *B*, *C*, and *D*, and ten thousand such have a right to hold a public meeting; and as *A* may say to *B* that he thinks an Act ought to be passed abolishing the House of Lords, or that the House of Lords are bound to reject any bill modifying the constitution of their House, and as *B* may make the same remark to any of his friends, the result ensues that *A* and ten thousand more may hold a public meeting either to support the government or to encourage the resistance of the Peers. Here then you have in substance that right of public meeting for political and other purposes which is constantly treated in foreign

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countries as a special privilege, to be exercised subject to careful restrictions. The assertion, however, that *A*, *B*, *C*, and *D*, and a hundred thousand more persons, just because they may each go where they like, and each say what they please, have a right to hold meetings for the discussion of political and other topics, does not of course mean that it is impossible for persons so to exercise the right of meeting as to break the law. The object of a meeting may be unlawful, e.g. the aim of the meeting may be to commit a crime by open force, in which case the meeting itself becomes an unlawful assembly.[1] The mode in which a meeting is held may threaten a breach of the peace on the part of those holding the meeting, and therefore inspire peaceable citizens with reasonable fear; in which again, the meeting will be unlawful. In either instance the meeting may lawfully be broken up, and the members of it expose themselves to all the consequences, in the way of arrest, prosecution, and punishment, which attend the doing of unlawful acts, or, in other words, the commission of crimes.

Consequences.

The law of public meetings involves some practical consequences which, though logically deduced from it, are found by many persons, magistrates and others, somewhat startling, and are not of invariable benefit to the nation.

Meeting not unlawful because it will excite unlawful opposition.

A public meeting which from the conduct of those engaged in it, as for example from their marching together in arms, threatens a breach of the peace on the part of those holding the meeting, and therefore fills peaceable citizens with reasonable fear, is an

[1] For the meaning of the term "unlawful assembly," see Appendix, Note iv., Questions connected with the Right of Public Meeting.

...e High assembly. But no meeting which would ... do a wise be illegal becomes unlawful because it ... is the opposition which is itself unlawful, and ... will indirectly lead to a breach of the peace. ... es, for example, that the members of the Salva... Army propose to hold a meeting at Oxford; ...ppose that a so-called Skeleton Army announce ... they will attack the Salvationists and disperse ...em by force. Suppose that thereupon peaceable ...ens, who do not like the quiet of the town to be ...sturbed, and who dread riots, urge the magistrates ... stop the meeting of the Salvationists, or if there is ...y now to arrest the members of both armies. This ...ay seem at first sight a reasonable request, but the ...agistrates cannot legally take the course suggested ... them. That under the present state of the law ... must be so is on reflection clear. The right of *A* ... walk down the High Street is not taken away by ...e threat of *X* to knock *A* down if *A* takes his pro...sed walk. It is true that *A's* going into the High ...reet will lead to a breach of the peace, but *A* no ...ore causes the breach of the peace than a man ...ose pocket is picked causes the theft by wearing a ...ich. *A* is the victim, not the author of a breach ... the law. Now if the right of *A* to walk down the ...igh Street is not affected by the threats of *X*, the ...ght of *A*, *B*, *C*, and *D* to march down the High ...reet together is not diminished by the proclamation ... *X*, *Y*, and *Z* that they will not suffer *A*, *B*, *C*, ...d *D* to take their walk. Nor does it make any ...fference that *A*, *B*, and *C* call themselves the ...lvation Army, or that *X*, *Y*, and *Z* call themselves ...e Skeleton Army. The plain principle is that *A's*

Part II. right to do a lawful act, namely, walk down lawful Street, cannot be diminished by *X*'s threat to other unlawful act, namely, to knock *A* down. Still exci principle established, or rather illustrated, us recent case of *Beatty* v. *Gillbanks*.[1] The Salvati Army met together at Weston-super-Mare with th knowledge that they would be opposed by th Skeleton Army. The magistrates had put out notice intended to forbid the meeting. The Salva tionists, however, assembled, were met by the police and told to obey the notice. *X*, one of the members declined to obey and was arrested. He was subse quently with others convicted by the magistrates o holding an unlawful assembly. It was an undoubte fact that the meeting of the Salvation Army wa likely to lead to an attack by the Skeleton Arm and in this sense cause a breach of the peace. T conviction, however, of *X* by the magistrates wa quashed on appeal to the Queen's Bench Division.

"What has happened here," say the Court, "
" that an unlawful organisation " [the Skeleton Army
" has assumed to itself the right to prevent the appel
" lants and others from lawfully assembling together
" and the finding of the justices amounts to this, tha
" a man may be convicted for doing a lawful act i
" he knows that his doing it may cause another to d
" an unlawful act. There is no authority for such
" a proposition."[2]

[1] 9 Q. B. D. 308.

[2] *Beatty* v. *Gillbanks*, 9 Q. B. D. 308, p. 314, per Field, J. *Beatt* v. *Glenister*, W. N., 1884, p. 93. See, however, the Irish cases; *Re* v. *M'Naghten*, 14 Cox, C. C. 572; *O'Kelly* v. *Harvey*, 15 Cox, C. C. 435 and Appendix, Note 4, Questions connected with the Right of Publi Meeting.

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Meeting not made unlawful by official proclamation of an illegality.

No public meeting, further, which would not otherwise be illegal, becomes so (unless in virtue of some special Act of Parliament) in consequence of any proclamation or notice by a Secretary of State, by a magistrate, or by any other official. Suppose, for example, that the Salvationists advertise throughout the town that they intend holding a meeting in a fi[illegible] which they have hired near Oxford, that they inte[illegible]emble in St. Giles's and march thence with to ass[illegible] and bands playing to their proposed [illegible]uners flying [illegible]ship. S[illegible]ose that the Home Secretar[illegible]ace of w[illegible] for [illegible]on or another, it is undesira[illegible] thinks th[illegible] [illegible]'d take place, and [illegible]at the meet[illegible]ber of the army, serves formal notice upon e[illegible]nduct th[illegible] so- or on the officers who are [illegible]gatl[illegible]ng called "campaign" at Ox[illegible] alte[illegible] the must not take place. This [illegible] be character of the meeting, [illegible] one [illegible] of illegal, the notice makes an[illegible] affect[illegible] the character of the assem[illegible] that the responsibility for attending [illegible] had not [illegible] meeting would have been law[illegible] wh[illegible] not[illegible] been issued, and it certainly [illegible]become [illegible] because a Secretary of State [illegible]dden it to [illegible] place. The proclamation [illegible]er these circumstances as little legal effect [illegible] have a proclamation from the Home Office [illegible]ng me or any other person to walk down the [illegible] Street. It follows therefore that the governme[illegible]s little or no power of preventing meetings whic[illegible]o all appearance are lawful, even though they may [illegible] fact turn out when actually convened to be unlawf[illegible]l because of the mode

[1] See *Rex* v. *Fursey*, 6 C. & P. 81.

2[illegible]

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in which they are conducted. This is certainly a singular instance of the way in which adherence to the principle that the proper function of the state is the punishment, not the prevention, of crimes, deprives the executive of discretionary authority.[1]

Meeting may be lawful though its

A meeting, lastly, may be perfectly lawful which nevertheless any wise or public-spirited person would hesitate to convene. For *A*, *B*, and *C* may have a right to hold a meeting, although their [illegible] as a matter of fact certainly excite [illegible] doing so of violence, and may probably [illegible] others to deed[illegible] pose that a zealous [illegible] bloodshed. [illegible] meeting for the p[illegible] were to con[illegible]vils of the confessional, [illegible] denouncing [illegible] the gathering [illegible] choose as the scene of [illegible] ation [illegible] large town filled with a would [illegible] be [illegible] Irish poor. The meeting prov[illegible] either [illegible] violence can doubt that it would non[illegible] coul[illegible] the magistrate, however, [illegible] might condemn prohibit it. Wise men [illegible] treme exercise law would sanction an ex[illegible] would [illegible] right of public meeting which probably [illegible] be tolerated in any other [illegible]pean coun[illegible] the policy or impolicy of [illegible]erving to the [illegible] authorities in the state the power to take [illegible] nary measures against the evils which may fl[illegible] the injudicious exercise of legal rights it is [illegible]ary here to say anything. The matter which i[illegible] notice is the way in which

[1] Recent events in Swi[illegible]nd suggest that the officials of a democratic Republic claim, whet[illegible] rightly or not, an authority in regard to the restraint of public me[illegible]ngs which is not conceded in England to the Crown or its servants. This curiously illustrates the remarks cited from De Tocqueville, pp. 172-174, *ante*, in reference to the non-existence in Switzerland of a spirit of legality.

[2] See, however, the Irish cases referred to, p. 358, note 2, *ante*.

the rules as to the right of public meeting illustrate both the legal spirit of our institutions and the process by which the decisions of the Courts as to the rights of individuals have in effect made the right of public meeting a part of the law of the constitution.[1]

[1] See generally as to the right of meeting, Stephen, *Commentaries*, iv. 213-217, and Stephen, *History of Criminal Law*, i. pp. 202-205. See Appendix, note 4, Questions connected with the Right of Public Meeting.

CHAPTER VIII

MARTIAL LAW

Part II.

No sharp line can be drawn between rules of private law or of criminal law and constitutional law.

THE rights already treated of in the foregoing chapter, as for example the right to personal freedom or the right to free expression of opinion, do not, it may be suggested, properly belong to the province of constitutional law at all, but form part either of private law strictly so called, or of the ordinary criminal l Thus *A's* right to personal freedom is, it may be sa only the right of *A* not to be assaulted, or imprison by *X*, or (to look at the same thing from anot point of view) is nothing else than the right of assaulted by *X*, to bring an action against *X*, have *X* punished as a criminal for the assault. in this suggestion there lies an element of impo truth, yet it is also undoubted that the right to sonal freedom, the right to free discussion, and like, appear in the forefront of many written cons tions, and are in fact the chief advantages v citizens hope to gain by the change from a despo a constitutional form of government.

The truth is that these rights may be looked from two points of vie They may be consid simply parts of private r it may be, of criminal

thus the right to personal freedom may, as already pointed out, be looked at as the right of *A* not to have the control of his body interfered with by *X*. But in so far as these rights hold good against the governing body in the state, or, in other words, in so far as these rights determine the relation of individual citizens towards the executive, they are part, and a most important part, of the law of the constitution.

Now the noticeable point is that in England the rights of citizens as against each other are (speaking generally) the same as the rights of citizens against any servant of the Crown. This is the significance of the assertion that in this country the law of the constitution is part of the ordinary law of the land. The fact that a Secretary of State cannot at his discretion and for reasons of state arrest, imprison, or punish any man, except of course where special powers are conferred upon him by statute, as by an Alien Act or by an Extradition Act, is simply a result of the principle that a Secretary of State is governed in his official as in his private conduct by the ordinary law of the realm. Were the Home Secretary to assault Mr. Parnell in a fit of anger, or were he to arrest Mr. Parnell in England because he thought the Home Rule leader's freedom dangerous to the state, the Secretary of State would in either case be liable to an action, and all other penalties to which a person exposes himself by committing an assault. The fact that Mr. Parnell's arrest was a strictly administrative act would afford no defence to the Minister, or to the constables who obeyed his orders.

The subjects treated of in this chapter and in the next three chapters clearly belong to the field of

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Turn the matter which way you will, you come back to the all-important consideration on which we have already dwelt, that whereas under many foreign constitutions the rights of individuals flow, or appear to flow, from the articles of the constitution, in England the law of the constitution is the result not the source of the rights of individuals. It becomes, too, more and more apparent that the means by which the Courts have maintained the law of the constitution have been the strict insistence upon the two principles, first of "equality before the law," which negatives

[1] See Mommsen, *Romische Staatsrecht*, p. 672, for the existence of what seems to have been a similar principle in early Roman law.

exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary Courts, and secondly of "personal responsibility of wrongdoers," which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors; the legal dogma, as old at least as the time of Edward the Fourth, that, if any man arrest another without lawful warrant, even by the King's command, he shall not be excused, but shall be liable to an action for false imprisonment, is not a special limitation imposed upon the royal prerogative, but the application to acts done under royal orders of that principle of individual responsibility which runs through the whole law of torts.[1]

Martial Law.

"Martial law,"[2] in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to what is called in France the "Declaration of the State of Siege,"[3] under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army (*autorité militaire*). This is an unmistakable proof of the permanent supremacy of the law under our constitution.

The assertion, however, that no such thing as martial law exists under our system of government,

[1] See Hearn, *Government of England* (2d ed.), chap. iv.; and compare Gardiner, *History*, x. pp. 144, 145.

[2] See Forsyth, *Opinions*, pp. 188-216, 481-563; Stephen, *History of Criminal Law*, i. pp. 201-216; *Rex* v. *Pinney*, 5 C. & P. 254; *Reg.* v. *Vincent*, 9 C. & P. 91; *Reg.* v. *Neale*, 9 C. & P. 431.

[3] See *Loi sur l'état de siége*, 9 *Aout* 1849, Roger et Sorel, *Codes et Lois*, p. 436. See p. 269, *post*.

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though perfectly true, will mislead any one who does not attend carefully to the distinction between two utterly different senses in which the term "martial law" is used by English writers.

In what sense martial law recognised by English law.

Martial law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognised in the most ample manner by the law of England. It is a power which has in itself no special connection with the existence of an armed force. The Crown has the right to put down breaches of the peace. Every subject, whether a civilian or a soldier, whether what is called a "servant of the government," such for example as a policeman, or a person in no way connected with the administration, not only has the right, but is, as a matter of legal duty, bound to assist in putting down breaches of the peace. No doubt policemen or soldiers are the persons who, as being specially employed in the maintenance of order, are most generally called upon to suppress a riot, but it is clear that all loyal subjects are bound to take their part in the suppression of riots.

It is also clear[1] that a soldier has, as such, no exemption from liability to the law for his conduct in restoring order. Officers, magistrates, soldiers, policemen, ordinary citizens, all occupy in the eye of the law the same position; they are, each and all of them, bound to withstand and put down breaches of the peace, such as riots and other disturbances; they are,

[1] See further, pp. 276-282, *post*.

each and all of them, authorised to employ so much force, even to the taking of life, as may be necessary for that purpose, and they are none of them entitled to use more; they are, each and all of them, liable to be called to account before a jury for the use of excessive, that is, of unnecessary force; they are each, it must be added—for this is often forgotten—liable, in theory at least, to be called to account before the Courts for non-performance of their duty as citizens in putting down riots, though of course the degree and kind of energy which each is reasonably bound to exert in the maintenance of order may depend upon and differ with his position as officer, magistrate, soldier, or ordinary civilian. Whoever doubts these propositions should study the leading case of *Rex* v. *Pinney*,[1] in which was fully considered the duty of the Mayor of Bristol in reference to the Reform Riots of 1831.

So accustomed have people become to fancy that the maintenance of the peace is the duty solely of soldiers or policemen, that many students will probably feel surprise on discovering, from the doctrine laid down in *Rex* v. *Pinney*, how stringent are the obligations of a magistrate in time of tumult, and how unlimited is the amount of force which he is bound to employ in support of the law. A student, further, must be on his guard against being misled, as he well might be, by the language of the Riot Act.[2] That statute provides, in substance, that if twelve rioters continue together for an hour after a magistrate has made a proclamation to them in the terms of the Act (which proclamation is absurdly enough called reading the Riot Act) ordering them to disperse, he may

[1] 5 C. & P. 254. [2] 1 Geo. I. stat. 2, c. 5.

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command the troops to fire upon the rioters or charge them sword in hand.[1] This, of course, is not the language, but it is the effect of the enactment. Now the error into which an uninstructed reader is likely to fall, and into which magistrates and officers have from time to time (and notably during the Gordon riots of 1780) in fact fallen, is to suppose that the effect of the Riot Act is negative as well as positive, and that therefore the military cannot be employed without the fulfilment of the conditions imposed by the statute. This notion is now known to be erroneous; the occasion on which force can be employed, and the kind and degree of force which it is lawful to use in order to put down a riot, is determined by nothing else than the necessity of the case.

If, then, by martial law be meant the power of the government or of legal citizens to maintain public order, at whatever cost of blood or property may be necessary, martial law is assuredly part of the law of England. Even, however, as to this kind of martial law one should always bear in mind that the question whether the force employed was necessary or excessive will, especially where death has ensued, be ultimately determined by a judge and jury, and that the estimate of what constitutes necessary force formed by a judge and jury, sitting in quiet and safety after the suppression of a riot, may differ considerably from the judgment formed by a general or magistrate, who is surrounded by armed rioters, and knows that at any moment a riot may become a formidable rebellion, and the rebellion if unchecked become a successful revolution.

[1] See Stephen, *History of Criminal Law*, i. pp. 202-205.

Chapter VIII.

Martial law is, however, more often used as the name for the government of a country or a district by military tribunals, which more or less supersede the jurisdiction of the Courts. The proclamation of martial law in this sense of the term is, as has been already pointed out,[1] nearly equivalent to the state of things which in France and many other foreign countries is known as the declaration of a "state of seige," and is in effect the temporary and recognised government of a country by military force. The legal aspect of this condition of affairs in states which recognise the existence of this kind of martial law can hardly be better given than by citing some of the provisions of the law which at the present day regulates the state of siege in France :—

In what sense martial law not recognised by English law.

French Law as to state of siege.

"7. *Aussitôt l'état de siége déclaré, les pouvoirs* "*dont l'autorité civile était revêtue pour le maintien de* "*l'ordre et de la police passent tout entiers à l'autorité* "*militaire.—L'autorité civile continue néanmoins à* "*exercer ceux de ces pouvoirs dont l'autorité militaire* "*ne l'a pas dessaisie.*

"8. *Les tribunaux militaires peuvent être saisis* "*de la connaissance des crimes et délits contre la* "*sûreté de la République, contre la constitution, contre* "*l'ordre et la paix publique, quelle que soit la* "*qualité des auteurs principaux et des complices.*

"9. *L'autorité militaire a le droit,—1° De faire* "*des perquisitions, de jour et de nuit, dans le domicile* "*des citoyens;—2° D'éloigner les repris de justice et* "*les individus qui n'ont pas leur domicile dans les* "*lieux, soumis à l'état de siége;—3° D'ordonner la* "*remise des armes et munitions, et de procéder à leur*

[1] See p. 265, *ante*.

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" *recherche et à leur enlèvement;*—4° *D'interdire les* " *publications et les réunions qu'elle juge de nature à* " *exciter ou à entretenir le désordre.*" [1]

We may reasonably, however, conjecture that the terms of the law give but a faint conception of the real condition of affairs when, in consequence of tumult or insurrection, Paris or some other part of France is declared in a state of siege, and, to use a significant expression known to some continental countries, "the constitutional guarantees are suspended." We shall hardly go far wrong if we assume that during this suspension of ordinary law any man whatever is liable to arrest, imprisonment, or execution at the will of a military tribunal consisting of a few officers who are excited by the passions natural to civil war. However this may be, it is clear that in France, even under the present Republican government, the suspension of law involved in the proclamation of a state of siege is a thing fully recognised by the constitution, and (strange though the fact may appear) the authority of military Courts during a state of siege is greater under the Republic than it was under the monarchy of Louis Philippe.[2]

Now, this kind of martial law is in England utterly unknown to the constitution. Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion. During the effort to restore peace, rebels may be lawfully killed

[1] Roger et Sorel, *Codes et Lois*, pp. 436, 437.

[2] See *Geoffroy's Case*, 24 *Journal du Palais*, p. 1218, cited by Forsyth, *Opinions*, p. 483.

just as enemies may be lawfully slaughtered in battle, or prisoners may be shot to prevent their escape, but any execution (independently of military law) inflicted by a Court-martial is illegal, and technically murder. Nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence, than *Wolfe Tone's Case.*[1] In 1798, Wolfe Tone, an Irish rebel, took part in a French invasion of Ireland. The man-of-war in which he sailed was captured, and Wolfe Tone was brought to trial before a Court-martial in Dublin. He was thereupon sentenced to be hanged. He held, however, no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place application was made to the Irish King's Bench for a writ of *habeas corpus*. The ground taken was that Wolfe Tone, not being a military person, was not subject to punishment by a Court-martial, or, in effect, that the officers who tried him were attempting illegally to enforce martial law. The Court of King's Bench at once granted the writ. When it is remembered that Wolfe Tone's substantial guilt was admitted, that the Court was filled with judges who detested the rebels, and that in 1798 Ireland was in the midst of a revolutionary crisis, it will be admitted that no more splendid assertion of the supremacy of the law can be found than that then made by the Irish Bench.

[1] 27 St. Tr. 614.

CHAPTER IX

THE ARMY [1]

THE English army consists of the Standing (or Regular) army, and of the Militia.

Each of these forces has been rendered subordinate to the law of the land. My object is not to give even an outline of the enactments affecting the army, but simply to explain the legal principles on which this supremacy of the law throughout the army has been secured.

It will be convenient in considering this matter to reverse the order pursued in the common text-books; these contain a great deal about the militia, and comparatively little about the regular forces, or what we now call the "army." The reason of this is that historically the militia is an older institution than the permanent army, and the existence of a standing army is historically, and according to constitutional theories,

[1] See Stephen, *Commentaries*, ii. book iv. chap. viii.; Gneist, *Das Englische Verwaltungsrecht*, ii. 952-966; *Manual of Military Law* (2d ed.)

As to Standing Army, 1 Will. & Mary, c. 5; see the Army Discipline and Regulation Act, 1879, 42 & 43 Vict. c. 33; the Army Act, 1881, 44 & 45 Vict. c. 58.

As to Militia, 13 Car. II. stat. 1, c. 6; 14 Car. II. c. 3; 15 Car. II. c. 4; 42 Geo. III. c. 90; Militia Act, 1882, 45 & 46 Vict. c. 49; and Regulation of the Forces Act, 1881, 44 & 45 Vict. c. 57.

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an anomaly. Hence the standing army is often treated by writers of authority as a sort of exceptional or subordinate topic, a kind of excrescence so to speak on the national and constitutional force known as the militia. As a matter of fact, of course, the standing army is now the real national force, and the militia is a body of comparatively small importance.

Standing Army. Its existence reconciled with Parliamentary government by annual Mutiny Acts.

As to the Standing Army.—A permanent army of paid soldiers, whose main duty is one of absolute obedience to commands, appears at first sight to be an institution inconsistent with that rule of law or submission to the civil authorities, and especially to the judges, which is essential to popular or Parliamentary government; and in truth the existence of permanent paid forces has often in most countries and at times in England—notably under the Commonwealth—been found inconsistent with the existence of what, by a lax though intelligible mode of speech, is called a free government.[1] The belief indeed of our statesmen down to a time considerably later than the Revolution of 1689 was that a standing army must be fatal to English freedom, yet very soon after the Revolution it became apparent that the existence of a body of paid soldiers was necessary to the safety of the nation. Englishmen, therefore, at the end of the seventeenth and the beginning of the eighteenth century, found themselves placed in this dilemma. With a standing army the country could not, they thought, escape from despotism; without a standing army the country could not, they perceived, avert invasion; the maintenance of national liberty appeared to involve the sacrifice of national independence.

[1] See *e.g.* Macaulay, *History*, iii. pp. 42-47.

Part II. Yet English statesmanship found almost by accident a practical escape from this theoretical dilemma, and the Mutiny Act, though an enactment passed in a hurry to meet an immediate peril, contains the solution of an apparently insolvable problem.

In this instance as in others of success achieved by what is called the practical good-sense, the political instinct, or the statesman-like tact of Englishmen, we ought to be on our guard against two errors.

We ought not on the one hand to fancy that English statesmen acted with some profound sagacity or foresight peculiar to themselves, and not to be found among the politicians of other countries. Still less ought we on the other to imagine that luck or chance helps Englishmen out of difficulties with which the inhabitants of other countries cannot cope. Political common-sense, or political instinct, means little more than habitual training in the conduct of affairs; this practical acquaintance with public business was enjoyed by educated Englishmen a century or two earlier than by educated Frenchmen or Germans, hence the early prevalence in England of sounder principles of government than have till recently prevailed in other lands. The statesmen of the Revolution succeeded in dealing with difficult problems, not because they struck out new and brilliant ideas, or because of luck, but because the notions of law and government which had grown up in England were in many points sound, and because the statesmen of 1689 applied to the difficulties of their time the notions which were habitual to the more thoughtful Englishmen of the day. The position of the army in fact was determined by an

adherence on the part of the authors of the first Mutiny Act to the fundamental principle of English law, that a soldier may, like a clergyman, incur special obligations in his official character, but is not thereby exempted from the ordinary liabilities of citizenship.

The object and principles of the first Mutiny Act[1] of 1689 are exactly the same as the object and principles of the Army Act, 1881, under which the English army is in substance now governed. A comparison of the two statutes shows at a glance what are the means by which the maintenance of military discipline has been reconciled with the maintenance of freedom, or, to use a more accurate expression, with the supremacy of the law of the land.

The preamble to the first Mutiny Act has reappeared with slight alterations in every subsequent Mutiny Act, and recites that "Whereas no man may "be forejudged of life or limb, or subjected to any "kind of punishment by martial law, or in any other "manner than by the judgment of his peers, and "according to the known and established laws of "this realm; yet, nevertheless, it" [is] "requisite for "retaining such forces as are, or shall be raised "during this exigence of affairs, in their duty an "exact discipline be observed; and that soldiers who "shall mutiny or stir up sedition, or shall desert "their majesties' service, be brought to a more ex-"emplary and speedy punishment than the usual "forms of law will allow."[2]

This recital states the precise difficulty which per-

[1] 1 Will. and Mary, c. 5.

[2] See Clode, *Military Forces of the Crown*, i. p. 499. Compare 47 Vict. c. 8. The variations in the modern Acts, though slight, are instructive.

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plexed the statesmen of 1689. Now let us observe the way in which it has been met.

A person who enlists as a soldier in a standing army, or (to use the wider expression of modern Acts) "a person subject to military law," stands in a twofold relation: the one is his relation towards his fellow-citizens outside the army; the other is his relation towards the members of the army, and especially towards his military superiors; any man, in short, subject to military law has duties and rights as a citizen as well as duties and rights as a soldier. His position in each respect is under English law governed by definite principles.

Soldier's position as citizen.

A soldier's position as a citizen.—The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. "Nothing in this act contained" (so runs the first Mutiny Act) "shall extend or be construed to exempt "any officer or soldier whatsoever from the ordinary "process of law."[1] These words contain the clue to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.

The results of this principle are traceable throughout the Mutiny Acts.

Criminal liability.

A soldier is subject to the same criminal liability as a civilian.[2] He may when in the British dominions

[1] 1 Will. and Mary, c. 5, s. 6; see Clode, *Military Forces of the Crown*, i. p. 500.

[2] Compare Army Act, 1881 (44 & 45 Vict. c. 58), secs. 41, 144, 162.

be put on trial before any competent "civil" (*i.e.* non-military) Court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal.[1] Thus if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Diemen's Land, his military character will not save him from standing in the dock on the charge of murder or theft.

Civil liability.

A soldier cannot escape from civil liabilities, as, for example, responsibility for debts; the only exemption which he can claim is that he cannot be forced to appear in Court, and could not, when arrest for debt was allowable, be arrested for any debt not exceeding £30.[2]

No one who has entered into the spirit of continental legislation can believe that (say in France or Prussia) the rights of a private individual would thus have been allowed to override the claims of the public service.

In all conflicts of jurisdiction between a military and a civil Court the authority of the civil Court prevails. Thus, if a soldier is acquitted or convicted of an offence by a competent civil Court, he cannot be tried for the same offence by a Court-martial;[3] but an acquittal or conviction by a Court-martial, say for

[1] Compare, however, the Jurisdiction in Homicide Act, 1862, 25 & 26 Vict. c. 65, and Clode, *Military Forces of the Crown*, i. pp. 206, 207.

[2] See Army Act, 1881 (44 & 45 Vict. c. 58), s. 144. Compare Clode, *Military Forces of the Crown*, i. pp. 207, 208, and *Thurston v. Mills*, 16 East, 254.

[3] Army Act, 1881 (44 & 45 Vict. c. 58), s. 162, sub-ss. 1-6.

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manslaughter or robbery, is no plea to an indictment for the same offence at the Assizes.[1]

Order of superiors no defence to charge of crime.

When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence.[2]

This is a matter which requires explanation.

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bonâ fide* obedience to the orders (say) of the

[1] Army Act, 1881 (44 & 45 Vict. c. 58), s. 162, sub-ss. 1-6. Contrast the position of the army in relation to the law of the land in France. The fundamental principle of French law is, as it apparently always has been, that every kind of crime or offence committed by a soldier or person subject to military law must be tried by a military tribunal. See *Code de Justice Militaire*, arts. 55, 56, 76, 77, and Le Faure, *Les Lois Militaires*, pp. 167, 173.

[2] Stephen, *History of Criminal Law*, i. pp. 204-206, and compare Clode, *Military Forces of the Crown*, ii. pp. 125-155. The position of a soldier is curiously illustrated by the following case. *X* was a sentinel on board the *Achille* when she was paying off. "The "orders to him from the preceding sentinel were, to keep off all boats, "unless they had officers with uniforms in them, or unless the officer "on deck allowed them to approach; and he received a musket, three "blank cartridges, and three balls. The boats pressed; upon which "he called repeatedly to them to keep off; but one of them persisted "and came close under the ship; and he then fired at a man who was "in the boat, and killed him. It was put to the jury to find, whether "the sentinel did not fire under the mistaken impression that it was "his duty; and they found that he did. But a case being reserved, "the judges were unanimous that it was, nevertheless, murder. They "thought it, however, a proper case for a pardon; and further, they "were of opinion, that if the act had been necessary for the pre-"servation of the ship, as if the deceased had been stirring up a "mutiny, the sentinel would have been justified."—Russell, *Crimes and Misdemeanours* (4th ed.), i. 823, on the authority of *Rex* v. *Thomas*, East, T., 1816, MS., Bayley, J. The date of the decision is worth noticing; no one can suppose that the judges of 1816 were disposed to underrate the rights of the Crown and its servants. The judgment of the Court rests upon and illustrates the incontrovertible principle of the Common Law that the fact of a person being a soldier and of his acting strictly under orders, does not of itself exempt him from criminal liability for acts which would be crimes if done by a civilian.

commander-in-chief. Hence the position of a soldier may be, both in theory and practice, a difficult one. He may, as it has been well said, be liable to be shot by a Court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it. His situation and the line of his duty may be seen by considering how soldiers ought to act in the following cases.

During a riot an officer orders his soldiers to fire upon rioters. The command to fire is justified by the fact that no less energetic course of action would be sufficient to put down the disturbance. The soldiers are, under these circumstances, clearly bound from a legal as well as from a military point of view to obey the command of their officer. It is a lawful order, and the men who carry it out are performing their duty both as soldiers and as citizens.

An officer orders his soldiers in a time of political excitement then and there to arrest and shoot without trial a popular leader against whom no crime has been proved, but who is suspected of treasonable designs. In such a case there is (it is conceived) no doubt that the soldiers who obey, no less than the officer who gives the command, are guilty of murder, and liable to be hanged for it when convicted in due course of law. In such an extreme instance as this the duty of soldiers is, even at the risk of disobeying their superior, to obey the law of the land.

An officer orders his men to fire on a crowd whom he thinks could not be dispersed without the use of firearms. As a matter of fact the amount of force which he wishes to employ is excessive, and order could be kept by the mere threat that force would be

Part II. used. The order therefore to fire is not in itself a lawful order, that is, the colonel, or other officer, who gives it, is not legally justified in giving it, and will himself be held criminally responsible for the death of any person killed by the discharge of firearms. What is, from a legal point of view, the duty of the soldiers? The matter is one which has never been absolutely decided; the following answer, given by Mr. Justice Stephen, is, it may fairly be assumed, as nearly correct a reply as the state of the authorities makes it possible to provide:—

"I do not think, however, that the question how "far superior orders would justify soldiers or sailors "in making an attack upon civilians has ever been "brought before the courts of law in such a manner "as to be fully considered and determined. Probably "upon such an argument it would be found that the "order of a military superior would justify his in- "feriors in executing any orders for giving which they "might fairly suppose their superior officer to have "good reasons. Soldiers might reasonably think "that their officer had good grounds for ordering "them to fire into a disorderly crowd which to them "might not appear to be at that moment engaged in "acts of dangerous violence, but soldiers could hardly "suppose that their officer could have any good "grounds for ordering them to fire a volley down a "crowded street when no disturbance of any kind "was either in progress or apprehended. The doc- "trine that a soldier is bound under all circumstances "whatever to obey his superior officer would be fatal "to military discipline itself, for it would justify the "private in shooting the colonel by the orders of the

"captain, or in deserting to the enemy on the field of "battle on the order of his immediate superior. I "think it is not less monstrous to suppose that "superior orders would justify a soldier in the "massacre of unoffending civilians in time of peace, "or in the exercise of inhuman cruelties, such as the "slaughter of women and children, during a rebellion. "The only line that presents itself to my mind is "that a soldier should be protected by orders for "which he might reasonably believe his officer to "have good grounds. The inconvenience of being "subject to two jurisdictions, the sympathies of which "are not unlikely to be opposed to each other, is an "inevitable consequence of the double necessity of "preserving on the one hand the supremacy of the "law, and on the other the discipline of the "army."[1]

The hardship of a soldier's position resulting from this inconvenience is much diminished by the power of the Crown to nullify the effect of an unjust conviction by means of a pardon.[2] While however a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law, he can under no circumstances escape the chance of his military conduct becoming the subject of inquiry before a civil tribunal, and cannot avoid liability on the ground of obedience to superior orders for any act

[1] Stephen, *Hist. Criminal Law of England*, i. pp. 205, 206. Compare language of Willes, J., in *Keighly* v. *Bell*, 4 F. & F. 763.

[2] As also by the right of the Attorney-General as representing the Crown to enter a *nolle prosequi*. See Stephen, *History of Criminal Law*, i. p. 496, and Archbold, *Pleading in Criminal Cases* (17th ed.), p. 105.

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which a man of ordinary sense must have known to be a crime.[1]

Soldier's position as member of army.

A soldier's position as a member of the army.—A citizen on entering the army becomes liable to special duties as being "a person subject to military law." Hence acts which if done by a civilian would be either no offence at all or only slight misdemeanours, *e.g.* an insult or a blow offered to an officer, may when done by a soldier become serious crimes and expose the person guilty of them to grave punishment. A soldier's offences moreover can be tried and punished by a Court-martial. He therefore in his military character of a soldier occupies a position totally different from that of a civilian; he has not the same freedom, and in addition to his duties as a citizen is subject to all the liabilities imposed by military law: but though this is so, it is not to be supposed that, even as regards a soldier's own position as a military man, the rule of the ordinary law is, at any rate in time of peace, excluded from the army.

The general principle on this subject is that the Courts of Law have jurisdiction to determine who are the persons subject to military law, and whether a given proceeding alleged to depend upon military law is really justified by the rules of law which govern the army.

[1] *Buron* v. *Denman*, 2 Ex. 167, is sometimes cited as showing that obedience to the orders of the Crown is a legal justification to an officer for committing a breach of law, but the decision in that case does not, in any way, support the doctrine erroneously grounded upon it. What the judgment in *Buron* v. *Denman* shows is that an act done by an English military or naval officer in a foreign country to a foreigner in discharge of orders received from the Crown may be an act of war, but does not constitute any breach of law for which an action can be brought against the officer in an English Court. Compare *Feather* v. *The Queen*, 6 B. & S. 257, 295, *per Curiam*.

Hence flow the following (among other) consequences.

The civil Courts determine[1] whether a given person is or is not "a person subject to military law."[2]

Enlistment, which constitutes the contract[3] by which a person becomes subject to military law, is a civil proceeding, and a civil Court may have to inquire whether a man has been duly enlisted, or whether he is or is not entitled to his discharge.[4]

If a Court-martial exceeds its jurisdiction, or an officer, whether acting as a member of a Court-martial or not, does any act not authorised by law, the action of the Court, or of the officer, is subject to the supervision of the Courts. "The proceedings by which "the courts of law supervise the acts of courts-"martial and of officers may be criminal or civil. "Criminal proceedings take the form of an indictment for assault, false imprisonment, manslaughter, or even murder. Civil proceedings may either be preventive, *i.e.*, to restrain the commission or continuance of an injury; or remedial, *i.e.*, to

[1] See *Wolfe Tone's Case*, 27 St. Tr. 614; *Douglas's Case*, 3 Q. B. 5; *Fry* v. *Ogle*, cited *Manual of Military Law* (2d ed.), pp. 188-190.

[2] See Army Act, 1881 (44 & 45 Vict. c. 58), ss. 175-184.

[3] "The enlistment of the soldier is a species of contract between the sovereign and the soldier, and under the ordinary principles of law cannot be altered without the consent of both parties. The result is that the conditions laid down in the Act under which a man was "enlisted cannot be varied without his consent."—*Manual of Military Law* (2d ed.), pp. 260, 261.

[4] See Army Act, 1881 (44 & 45 Vict. c. 58), s. 96, for special provisions as to the delivering to a master of an apprentice who, being under twenty-one, has enlisted as a soldier. Under the present law at any rate it can very rarely happen that a Court should be called upon to consider whether a person is improperly detained in military custody as a soldier. See Army Act, 1881, s. 1, and s. 100, sub-ss. 2, 3. The Courts used to interfere, when soldiers were impressed, in cases of improper impressment. See Clode, *Military Forces*, ii. pp. 8 and 587.

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"afford a remedy for injury actually suffered. Broadly "speaking, the civil jurisdiction of the courts of law "is exercised as against the tribunal of a court-"martial by writs of prohibition or certiorari; and as "against individual officers by actions for damages. "A writ of habeas corpus also may be directed to "any officer, governor of a prison, or other, who has "in his custody any person alleged to be improperly "detained under colour of military law."[1]

Lastly, the whole existence and discipline of the standing army, at any rate in time of peace, depends upon the passing of an annual Mutiny Act. If a Mutiny Act were not in force, a soldier would not be bound by military law. Desertion would be at most only a breach of contract, and striking an officer would be no more than an assault.

Militia.

As to the Militia.[2]—The militia is the constitutional force existing under the law of the land for the defence of the country, and the older Militia Acts, especially 14 Car. II. c. 3, show that in the seventeenth century Parliament meant to rely for the defence of England upon this national army raised from the counties and placed under the guidance of country gentlemen. The militia may still be raised by ballot and is in theory a local force levied by conscription. But the power of raising by ballot has been for a considerable time suspended,[3] and the militia, like the regular army, is in fact recruited by voluntary enlistment.

[1] *Manual of Military Law*, pp. 177, 178. It should, however, be noted that the Courts of law will not, in general at any rate, deal with rights dependent on military status and military regulations.

[2] See Militia Act, 1882, 45 & 46 Vict. c. 49.

[3] See 28 & 29 Vict. c. 46.

The militia is from its nature a body hardly capable of being used for the purpose of overthrowing Parliamentary government. But even with regard to the militia, care has been taken by the legislature to ensure that it shall be subject to the rule of law. The members of the local army are (speaking in general terms) subject to military law only when in training or when the force is embodied. Embodiment indeed converts the militia for the time being into a regular army, though an army which cannot be required to serve abroad. But the embodiment can lawfully take place only in "case of imminent national danger or of great emergency." If Parliament is sitting, the occasion for embodying the militia must be communicated to Parliament before the proclamation for embodying it is issued. If Parliament is not sitting, a proclamation must be issued for the meeting of Parliament within ten days after the Crown has ordered the militia to be embodied.[1] Add to this, that the maintenance of discipline among the members of the militia when it is embodied depends on the continuance of the annual Mutiny Act.[2]

[1] Militia Act, 1882 (45 & 46 Vict. c. 49), s. 18.

[2] There exists an instructive analogy between the position of persons subject to military law, and the position of the clergy of the Established Church.

A clergyman of the National Church, like a soldier of the National Army, is subject to duties and to Courts to which other Englishmen are not subject. He is bound by restrictions, as he enjoys privileges peculiar to his class, but the clergy are no more than soldiers exempt from the law of the land. Any deed which would be a crime or a wrong when done by a layman, is a crime or a wrong when done by a clergyman, and is in either case dealt with by the ordinary tribunals.

Moreover, as the Common Law Courts determine the legal limits to the jurisdiction of Courts-martial, so the same Courts in reality

Part II. determine (subject of course to Acts of Parliament) what are the limits to the jurisdiction of ecclesiastical Courts.

The original difficulty, again, of putting the clergy on the same footing as laymen, was at least as great as that of establishing the supremacy of the civil power in all matters regarding the army. Each of these difficulties was met at an earlier date and has been overcome with more completeness in England than in some other countries. We may plausibly conjecture that this triumph of law was due to the acknowledged supremacy of the King in Parliament, which itself was due to the mode in which the King, acting together with the two Houses, manifestly represented the nation, and therefore was able to wield the whole moral authority of the state.

CHAPTER X

THE REVENUE[1]

As in treating of the army my aim was simply to point out what were the principles determining the relation of the armed forces of the country to the law of the land, so in treating of the revenue my aim is not to give even a sketch of the matters connected with the raising, the collection, and the expenditure of the national income, but simply to show that the collection and expenditure of the revenue, and all things appertaining thereto, are governed by strict rules of law. Attention should be fixed upon three points,—the *source* of the public revenue—the *authority* for expending the public revenue—and the *securities* provided by law for the due appropriation of the public revenue, that is, for its being expended in the exact manner which the law directs.

Source.

Source of Public Revenue.—It is laid down by Blackstone and other authorities that the revenue consists of the hereditary or "ordinary" revenue of the Crown and of the "extraordinary" revenue depending upon taxes imposed by Parliament. Historically this

[1] Stephen, *Commentaries*, ii. pp. 530-583; Hearn, *Government of England* (2d ed.), c. 13, pp. 351-388; May, *Parliamentary Practice*, (8th ed.), chap. xxi.; see Exchequer and Audit Act, 1866, 29 & 30 Vict. c. 39, and 1 & 2 Vict. c. 2, s. 2.

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distinction is of interest. But for our purpose we need hardly trouble ourselves at all with the hereditary revenue of the Crown, arising from Crown lands, droits of admiralty, and the like. It forms an insignificant portion of the national resources, amounting to not much more than £500,000 a year. It does not moreover at the present moment belong specially to the Crown, for it was commuted at the beginning of the reign of the present Queen as it was at the beginning of the reign of William IV. for a fixed "civil list," or sum payable yearly for the support of the dignity of the Crown. The whole then of the hereditary revenue is now paid into the national exchequer and forms part of the income of the nation. We may therefore, putting the hereditary revenue out of our minds, direct our whole attention to what is oddly enough called the "extraordinary," but is in reality the ordinary or Parliamentary revenue of the nation.

The whole of the national revenue amounts in round numbers to somewhere about £89,000,000 annually. It is (if we put out of sight the small hereditary revenue of the Crown)[2] raised wholly by taxes imposed by law. The national revenue therefore depends wholly upon law, and upon statute-law it is the creation of Acts of Parliament.

[1] The Chancellor of the Exchequer in his Budget speech, as reported in the *Times* of 27th March 1888, gave the total revenue for the year at £89,287,000.

[2] It is worth noting that the beer duties are still a portion of the hereditary revenues of the Crown, and that, though they are not now levied, the claim of the Crown to them would revive, if at any time the right to the hereditary revenues were not surrendered. See Dowell *History of Taxation*, iv. p. 132; 12 Car. II. c. 24; 11 Geo. IV. & 1 Will. IV. c. 51; and 1 & 2 Vict. c. 2, s. 7.

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While no one can nowadays fancy that taxes can be raised otherwise than in virtue of an Act of Parliament, there prevails, it may be suspected, with many of us a good deal of confusion of mind as to the exact relation between the raising of the revenue and the sitting of Parliament. People often talk as though, if Parliament did not meet, no taxes would be legally payable, and the assembling of Parliament were therefore secured by the necessity of filling the national exchequer. This idea is encouraged by the study of periods, such as the reign of Charles I., during which the Crown could not legally obtain necessary supplies without the constant intervention of Parliament. But the notion that at the present day no money could legally be levied if Parliament ceased to meet is unfounded. Millions of money would come into the Exchequer even though Parliament did not sit at all. For though all taxation depends upon Act of Parliament, it is far from being the case that all taxation now depends upon annual or temporary Acts.

Taxes are made payable in two different ways, *i.e.* either by permanent or by yearly Acts.

Taxes, the proceeds of which amount to nearly four-fifths of the whole yearly revenue are imposed by permanent Acts; such taxes are the land tax,[1] the excise,[2] the stamp duties,[3] and the like. These taxes would continue to be payable even though Parliament should not be convened for years. We should all, to take an example which comes home to every

[1] 38 George III. c. 5.
[2] See Stephen, *Commentaries*, ii. pp. 566-569.
[3] Stamp Act, 1870, 33 & 34 Vict. c. 97.

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one, be legally compellable to buy the stamps for our letters even though Parliament did not meet again till (say) A.D. 1900.

Other taxes, and notably the income tax, the proceeds of which make up the remaining fifth of the national income, are imposed by yearly Acts. If by any chance Parliament should not be convened for a year, no one would be under any legal obligation to pay income tax.[1]

This distinction between revenue depending upon permanent Acts and revenue depending upon temporary Acts is worth attention, but the main point of course to be borne in mind is that all taxes are imposed by statute, and that no one can be forced to pay a single shilling by way of taxation which cannot be shown to the satisfaction of the judges to be due from him under Act of Parliament.

Authority for expenditure.

Authority for expending revenue.—At one time revenue once raised by taxation was in truth and in reality a grant or gift by the Houses of Parliament to the Crown. Such grants as were made to Charles the First or James the First were moneys truly given to the King. He was, as a matter of moral duty bound, out of the grants made to him, as out of the hereditary revenue, to defray the expenses of government; and the gifts made to the King by Parliament were never intended to be "money to put into his own pocket,"[2] as the expression goes. Still it was in truth money of which the King or his Ministers could and did regulate the distribution. One o

[1] The income tax and the tea duties are imposed by annual Acts. The receipts of these taxes for the year 1887-88 amounted, in round numbers, to about £18,000,000.

[2] See the Preamble, 1 Anne, c. 1.

the singularities which mark the English constitution is the survival of mediæval notions, which more or less identified the King's property with the national revenue, after the passing away of the state of society to which such ideas naturally belonged; in the time of George the Third many public expenses, as for example the salaries of the judges, were charged upon the civil list, and thus were mixed up with the King's private expenditure. At the present day, however, the whole public revenue is treated not as the King's property but as public income; and as to this two matters deserve special observation.

First. The whole revenue of the nation is paid into the Bank of England[1] to the "account of Her Majesty's Exchequer,"[2] mainly through the Inland Revenue Office.[3] That office is a mere place for the receipt of taxes; it is a huge money-box into which day by day moneys paid as taxes are dropped, and whence such moneys are taken daily to the Bank. What, I am told, takes place is this. Each day large amounts are received at the Inland Revenue Office; two gentlemen come there each afternoon in a cab from the Bank; they go through the accounts for the day with the proper officials; they do not leave till every item is made perfectly clear; they then take

[1] Or into the Bank of Ireland. See Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 10.

[2] *Ibid.* and *Control and Audit of Public Receipts and Expenditure*, pp. 7, 8. But a system of appropriations in aid has been introduced during the last two years under which certain moneys which before were treated as extra receipts, and paid into the exchequer, are not paid into the exchequer, but are applied by the department where they are received in reduction of the money voted by Parliament.

[3] £55,916,974 were collected in the year 1887-88 by the Inland Revenue establishment.

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all the money received, and drive off with it and pay it into the Bank of England.

Secondly. Not a penny of revenue can be legally expended except under the authority of some Act of Parliament.

This authority may be given by a permanent Act, as for example by the Civil List Act, 1 & 2 Vict. c. 2, or by the National Debt and Local Loans Act, 1887; or it may be given by the Appropriation Act, that is, the annual Act by which Parliament "appropriates" or fixes the sums payable to objects (the chief of which is the support of the army and navy) which are not provided for, as is the payment of the National Debt, by permanent Acts of Parliament.

The whole thing, to express it in general terms, stands thus.

There is paid into the Bank of England a national income raised by different taxes amounting to about £89,000,000 per annum. This £89,000,000 constitutes the revenue or "consolidated fund."

Every penny of it is, unless the law is broken, paid away in accordance with Act of Parliament. The authority to make payments from it is given in many cases by permanent Acts; thus the whole of the interest on the National Debt is payable out of the consolidated fund under the National Debt and Local Loans Act, 1887. The order or authority to make payments out of it is in other cases given by a yearly Act, namely, the Appropriation Act, which determines the mode in which the supplies granted by Parliament (and not otherwise appropriated by permanent Acts) are to be spent. In either case, and this is the point to bear in mind, payments made out of the national

Chapter X.

revenue are made by and under the authority of the law, namely, under the directions of some special Act of Parliament.

The details of the method according to which supplies are annually voted and appropriated by Parliament are amply treated of in works which deal with Parliamentary practice.[1] The matter which requires our attention is the fact that each item of expenditure (such for example as the wages paid to the army and navy) which is not directed and authorised by some permanent Act is ultimately authorised by the Appropriation Act for the year, or by special Acts which for convenience are passed prior to the Appropriation Act and are enumerated therein. The expenditure therefore, no less than the raising of taxation, depends wholly and solely upon Parliamentary enactment.

Security for proper expenditure.

Security for the proper appropriation of the revenue.—What, it may be asked, is the real security that moneys paid by the taxpayers are expended by the Government in accordance with the intention of Parliament?

The answer is that this security is provided by an elaborate scheme of control and audit. Under this system not a penny of public money can be obtained by the Government without the authority or sanction of persons (quite independent, be it remarked, of the Cabinet) whose duty it is to see that no money is paid out of the Exchequer except under legal authority. To the same officials ultimately comes the knowledge of the way in which money thus paid out is actually expended, and they are bound to report to Parliament

[1] See especially May, *Parliamentary Practice*, chap. xxi.

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upon any expenditure which is or may appear to be not authorised by law.

The centre of this system of Parliamentary control is the Comptroller and Auditor General.[1]

He is a high official, absolutely independent of the Cabinet; he can take no part in politics, for he cannot be either a member of the House of Commons, or a peer of Parliament. He in common with his subordinate — the Assistant Comptroller and Auditor General—is appointed by a patent under the Great Seal, holds his office during good behaviour, and can be removed only on an address from both Houses of Parliament.[2] He is head of the Exchequer and Audit Department. He thus combines in his own person two characters which formerly belonged to different officials. He is controller of the issue of public money; he is auditor of public accounts. He is called upon, therefore, to perform two different functions, which the reader ought, in his own mind, to keep carefully distinct from each other.

In exercise of his duty of control the Comptroller General is bound, with the aid of the officials under him, to see that the whole of the national revenue, which, it will be remembered, is lodged in the Bank of England to the account of the Exchequer, is paid out under legal authority, that is, under the provisions of some Act of Parliament.

The Comptroller General is enabled to do this because, whenever the Treasury (through which office alone the public moneys are drawn out from the Bank)

[1] *Control and Audit of Public Receipts and Expenditure*, 1885.

[2] The Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), sec. 3.

needs to draw out money for the public service, the Treasury must make a requisition to the Comptroller General authorising the payment from the public moneys at the Bank of the definite sum required.[1]

The payments made by the Treasury are, as already pointed out, made either under some permanent Act, for what are technically called "consolidated fund services," as, for example, to meet the interest on the National Debt, or under the yearly Appropriation Act, for what are technically called "supply services," as, for example, to meet the expenses of the army or the navy.

In either case the Comptroller General must, before granting the necessary credit, satisfy himself that he is authorised in doing so by the terms of the Act under which it is demanded. He must also satisfy himself that every legal formality, necessary for obtaining public money from the Bank, has been duly complied with. Unless, and until, he is satisfied he ought not to grant, and will not grant, a credit for the amount required; and until this credit is obtained, the money required cannot be drawn out of the Bank.

The obtaining from the Comptroller General of a grant of credit may appear to many readers a mere formality, and we may suppose that it is in most cases given as a matter of course. It is however a formality which gives an opportunity to an official, who has no interest in deviating from the law, for preventing the least irregularity on the part of the Government in the drawing out of public money.

[1] See *Control and Audit of Public Receipts and Expenditure*, 1885, pp. 61-64, and Forms No. 8 to No. 12.

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The Comptroller's power of putting a check on government expenditure has, oddly enough, been pushed to its extreme length in comparatively recent times. In 1811 England was in the midst of the great war with France; the King was a lunatic, a Regency Bill was not yet passed, and a million pounds were required for the payment of the navy. Lord Grenville, the then Auditor of the Exchequer, whose office corresponded to a certain extent with that of the present Comptroller and Auditor General, refused to draw the necessary order on the Bank, and thus prevented the million, though granted by Parliament, from being drawn out. The ground of his lordship's refusal was that he had received no authority under the Great Seal or the Privy Seal, and the reason why there was no authority under the Privy Seal was that the King was incapable of affixing the Sign Manual, and that the Sign Manual not being affixed, the clerks of the Privy Seal felt, or said they felt, that they could not consistently with their oaths allow the issue of letters of Privy Seal upon which the warrant under the Privy Seal was then prepared. All the world knew the true state of the case. The money was granted by Parliament, and the irregularity in the issue of the warrants was purely technical, yet the law officers—members themselves of the Ministry—advised that Lord Grenville and the clerks of the Privy Seal were in the right. This inconvenient and, as it seems to modern readers, unreasonable display of legal scrupulosity masked, it may be suspected, a good deal of political by-play. If Lord Grenville and his friends had not been anxious that the Ministry should press on the Regency Bill, the officials of the

Exchequer would perhaps have seen their way through the technical difficulties which, as it was, appeared insurmountable, and it is impossible not to suspect that Lord Grenville acted rather as a party leader than as Auditor of the Exchequer. But be this as it may, the debates of 1811 [1] prove to demonstration that a Comptroller General can if he chooses put an immediate check on any irregular dealings with public moneys.

In exercise of his duty as Auditor the Comptroller General audits all the public accounts;[2] he reports annually to Parliament upon the accounts of the past year. Accounts of the expenditure under the Appropriation Act are submitted by him at the beginning of every session to the Public Accounts Committee of the House of Commons—a Committee appointed for the examination of the accounts—showing the appropriation of the sums granted by Parliament to meet the public expenditure. This examination is no mere formal or perfunctory supervision; a glance at the reports of the Committee shows that the smallest expenses which bear the least appearance of irregularity, even if amounting only to a pound or two, are gone into and discussed by the Committee. The results of their discussions are published in reports submitted to Parliament.

The general result of this system of control and audit is, that in England we possess accounts of the national expenditure of an accuracy which cannot be rivalled by the public accounts of other countries, and

[1] Cobbett's *Parl. Debates*, xviii. pp. 678, 734, 787.

[2] In auditing the accounts he inquires into the legality of the purposes for which public money has been spent, and in his report to Parliament calls attention to any expenditure of doubtful legality.

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that every penny of the national income is expended under the authority and in accordance with the provisions of some Act of Parliament.[1]

How, a foreign critic might ask, is the authority of the Comptroller General compatible with the orderly transaction of public business; how, in short, does it happen that difficulties like those which arose in 1811 are not of constant recurrence?

The general answer of course is, that high English officials, and especially officials removed from the sphere of politics, have no wish or temptation to hinder the progress of public business; the Auditor of the Exchequer was in 1811, be it noted, a peer and a statesman. The more technical reply is, that the law provides two means of overcoming the perversity or factiousness of any Comptroller who should

[1] The main features of the system for the control and audit of national expenditure have been authoritatively summarised as follows:—

"The gross revenue collected is paid into the Exchequer.

"Issues from the Exchequer can only be made to meet expenditure "which has been sanctioned by Parliament, and to an amount not "exceeding the sums authorised.

"The issues from the Exchequer and the audit of Accounts are "under the control of the Comptroller and Auditor General, who "is an independent officer responsible to the House of Commons, and "who can only be removed by vote of both Houses of Parliament.

"Such payments only can be charged against the vote of a year as "actually came in course of payment within the year.

"The correct appropriation of each item of Receipt and Expendi-"ture is insured.

"All unexpended balances of the grants of a year are surrendered "to the Exchequer, as also are all extra Receipts and the amount of "Appropriations-in-Aid received in excess of the sum estimated to be "taken in aid of the vote.

"The accounts of each year are finally reviewed by the House of "Commons, through the Committee of Public Accounts, and any excess "of expenditure over the amount voted by Parliament for any service, "must receive legislative sanction."—*Control and Audit of Public Receipts and Expenditure*, 1885, pp. 24, 25.

without due reason refuse his sanction to the issue of public money. He can be removed from office on an address of the two Houses, and he probably might, it has been suggested, be coerced into the proper fulfilment of his duties by a mandamus[1] from the High Court of Justice. The worth of this suggestion, made by a competent lawyer, has never been, and probably never will be, tested. But the possibility that the executive might have to seek the aid of the Courts in order to get hold of moneys granted by Parliament, is itself a curious proof of the extent to which the expenditure of the revenue is governed by law, or, what is the same thing, may become dependent on the decision of the judges upon the meaning of an Act of Parliament.

[1] See Bowyer, *Commentaries on Constitutional Law*, p. 210; Hearn, *Government of England* (2d ed.), p. 375.

CHAPTER XI

THE RESPONSIBILITY OF MINISTERS

Part II.

Ministerial responsibility

MINISTERIAL responsibility means two utterly different things.

It means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons.

This is a matter depending on the conventions of the constitution with which law has no direct concern.

It means, when used in its strict sense, the legal responsibility of every Minister for every act of the Crown in which he takes part.

This responsibility, which is a matter of law, rests on the following foundation. There is not to be found in the law of England, as there is found in most foreign constitutions, an explicit statement that the acts of the monarch must always be done through a Minister, and that all orders given by the Crown must, when expressed in writing, as they generally are, be countersigned by a Minister. Practically, however, the rule exists.

In order that an act of the Crown may be re-

cognised as an act of the Crown or have any legal effect, it must in general be done through a Minister or be done under some seal, as, for example, the Great Seal or the Privy Seal, which is in the keeping of a Minister. Thus the "Secretaries of State are "the channels which convey the Royal pleasure "throughout the body politic both at home and "abroad. The countersignature of one of them is "necessary to give effect to the Royal sign-manual. "The patronage of the Crown both in Church and "State is administered under this safeguard. To "every public document signed by the Sovereign the "signature of a Secretary of State is appended, and the "Minister must answer for what the Crown has done."[1]

Numerous acts, again, can be commanded by the Crown only under particular seals, such as the Signet, the Privy Seal, or the Great Seal; and in many instances for the due giving of a royal order, *e.g.* for the making of a grant, several of these seals are required.[2] Now, as each of these seals is in the keeping of separate officials, and can be affixed only with the sanction of the Minister who keeps it, the result is that at least one Minister, and often more, must take part in any act of the Crown, which has any legal effect, *e.g.* the making of a grant, the giving an order, or the signing of a treaty.

The Minister or servant of the Crown who thus takes part in giving expression to the Royal will is legally responsible for the act in which he is concerned, and he cannot get rid of his liability by

[1] Clode, *Military Forces of the Crown*, ii. pp. 320, 321, citing the words of Sir James Graham in the *Military Organisation Report*, 1860, p. 1; *The Elsebe*, 5 Rob. 173, 177; *Buron* v. *Denman*, 2 Ex. 167, 189.

[2] See however the Great Seal Act, 1884, 47 & 48 Vict. c. 30.

Part II. pleading that he acted in obedience to royal orders. Now suppose that the act done is illegal, the Minister concerned in it becomes at once liable to criminal or civil proceedings in a Court of Law. In some instances, it is true, the only legal mode in which his offence could be reached may be an impeachment. But an impeachment itself is a regular though unusual mode of legal procedure before a recognised tribunal, namely, the High Court of Parliament. Impeachments indeed may, though one took place as late as 1805, be thought now obsolete, but the cause why this mode of enforcing Ministerial responsibility is almost out of date is partly that Ministers are now rarely in a position where there is even a temptation to commit the sort of crimes for which impeachment is an appropriate remedy, and partly that the result aimed at by impeachment could now in many cases be better obtained by proceedings before an ordinary Court. The point however which should never be forgotten is this; it is now well established law that the Crown can act only through Ministers and according to certain prescribed forms which absolutely require the co-operation of some Minister, such as a Secretary of State or the Lord Chancellor, who thereby becomes not only morally but legally responsible for the legality of the act in which he takes part. Hence, indirectly but surely, the action of every servant of the Crown, and therefore in effect of the Crown itself, is brought under the supremacy of the law of the land. Behind Parliamentary responsibility lies legal liability, and the acts of Ministers no less than the acts of subordinate officials are made subject to the rule of law.

CHAPTER XII

RULE OF LAW CONTRASTED WITH *DROIT ADMINISTRATIF*

It has been already pointed out[1] that in many countries, and especially in France, servants of the State are in their official capacity to a great extent protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject to official law, administered by official bodies. This scheme of so-called administrative law is opposed to all English ideas, and by way of contrast admirably illustrates the full meaning of that rule of law which is an essential characteristic of our Constitution. A student therefore will do well to try and understand the general characteristics of that administrative law which under one name or another[2] prevails in most continental States, and this end is most easily attained by a survey (which for our present purpose must be a cursory one) of the nature and principles of the system known to Frenchmen as *droit administratif*.

The term *droit administratif*[3] is one for which

[1] See p. 182, *ante*.

[2] As for instance in Germany, *Verwaltungsrecht*.

[3] On this topic see Aucoc, *Conférences sur l'administration et le droit administratif* (3d ed.); Vivien, *Études Administratives*; Bœuf, *Droit Administratif* (4th ed.)

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English legal phraseology supplies no proper equivalent. The words "administrative law," which are its most natural rendering, are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation.

This absence from our language of any satisfactory equivalent for the expression *droit administratif* is significant; the want of a name arises at bottom from our non-recognition of the thing itself. In England, and in countries which, like the United States, derive their civilisation from English sources, the system of administrative law and the very principles on which it rests are in truth unknown. This absence from the institutions of the Union of anything answering to *droit administratif* arrested the observation of De Tocqueville from the first moment when he began his investigations into the characteristics of American democracy. In 1831 he writes to an experienced French judge (*magistrat*), Monsieur De Blosseville, to ask both for an explanation of the contrast in this matter between French and American institutions, and also for an authoritative explanation of the general ideas (*notions générales*) governing the *droit administratif* of his country.[1] He grounds his

[1] De Tocqueville's language is so remarkable and bears so closely on our topic that it deserves quotation: "*Ce qui m'empêche le plus, je vous avoue, de savoir ce qui se fait sur ces différents points en Amérique, c'est d'ignorer, à peu près complètement, ce qui existe en France. Vous savez que, chez nous, le droit administratif et le droit civil forment comme deux mondes séparés, qui ne vivent point toujours en paix, mais qui ne sont ni assez amis ni assez ennemis pour se bien connaître. J'ai toujours vécu dans l'un et suis fort ignorant de ce qui se passe dans l'autre. En même temps que j'ai senti le besoin d'acquérir les notions générales qui me manquent à cet égard, j'ai pensé que je ne pouvais mieux faire que de m'adresser à vous.*"—De Tocqueville, *Œuvres Complètes*, vii. p. 66.

request for information on his own ignorance about this special branch of French jurisprudence, and clearly implies that this want of knowledge is not uncommon among French lawyers.

When we know that a legist of De Tocqueville's ability found it necessary to ask for instruction in the "general ideas" of administrative law, we may safely assume that the topic is one which, even in the eyes of a French lawyer, bears an exceptional character, and need not wonder that Englishmen find it difficult to appreciate the nature of rules which are, admittedly, foreign to the spirit and traditions of our institutions. It is however this very contrast between administrative law as it prevails in France, and the notions of equality before the law of the land which are firmly established in modern England, that makes it worth while to study, not of course the details, but what De Tocqueville calls the *notions générales* of French *droit administratif*. Our aim should be to seize the general nature of administrative law and the principles on which the whole system of *droit administratif* depends, to note the salient characteristics by which this system is marked, and, lastly, to make clear to ourselves how it is that the existence of a scheme of administrative law makes the legal situation of every government official in France totally different from the legal situation of servants of the state in England, and in fact establishes a condition of things fundamentally inconsistent with what Englishmen regard as the due supremacy of the ordinary law of the land.

Droit administratif, or "administrative law," has been defined by French authorities in general terms as "the body of rules which regulate the relations of

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Droit administratif—its nature.

"the administration or of the administrative authority "towards private citizens;"[1] and Aucoc in his work on *droit administratif* describes his topic in this very general language:[2] "Administrative law "determines (1) the constitution and the relations of "those organs of society which are charged with the "care of those social interests (*intérêts collectifs*) which "are the object of public administration, by which "term is meant the different representatives of society "among which the state is the most important, and "(2) the relation of the administrative authorities "towards the citizens of the state."

These definitions are obviously wanting in precision, and their vagueness is not without significance. As far, however, as an Englishman may venture to deduce the meaning of *droit administratif* from foreign treatises and Reports, it may (at any rate for our present purpose) be best described, as that portion of French law which determines, (i.) the position and liabilities of all state officials, and (ii.) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the state, and (iii.) the procedure by which these rights and liabilities are enforced.

The effect of this description is most easily made intelligible to English students by giving examples of

[1] "*On le définit ordinairement l'ensemble des règles qui régissent les "rapports de l'administration ou de l'autorité administrative avec les "citoyens.*"—Aucoc, *Droit Administratif*, i. s. 6.

[2] "*Nous préférerions dire, pour notre part: Le droit administratif "détermine: 1°. la constitution et les rapports des organes de la société "chargés du soin des intérêts collectifs qui font l'objet de l'administration "publique, c'est-à-dire des différentes personnifications de la société, dont "l'État est la plus importante; 2°. les rapports des autorités administra "tives avec les citoyens.*"—*Ibid.*

the sort of matters to which the rules of administrative law apply. If a Minister, a Prefect, a policeman, or any other official commits acts in excess of his legal authority (*excès de pouvoirs*), as, for example, if a police officer in pursuance of orders, say from the Minister of the Interior, wrongfully arrests a private person, the rights of the individual aggrieved and the mode in which these rights are to be determined is a question of administrative law. If, again, a contractor enters into a contract with any branch of the administration, *e.g.* for the supply of goods to the government, or for the purchase of stores sold off by a public office, and a dispute arises as to whether the contract has been duly performed, or as to the damages due from the government to the contractor for a breach of it, the rights of the contracting parties are to be determined in accordance with the rules of administrative law, and to be enforced (if at all) by the methods of procedure which that law provides. All dealings, in short, in which the rights of an individual in reference to the state or officials representing the state come in question, fall within the scope of administrative law. Chapter XII.

Any one who considers with care the nature of the *droit administratif* of France, or the kind of topics to which it applies, will soon discover that it rests at bottom on two leading ideas alien to the conceptions of modern Englishmen. *Droit administratif*—its two leading principles.

The first of these notions is that the government, and every servant of the government, possesses, as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens, and that the extent of these rights, privileges, Privileges of the state.

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or prerogatives is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the state does not, according to French ideas, stand on anything like the same footing on which he stands in dealings with his neighbour.

A, for example, being a private person, enters into a contract with *X*, also a private person. *X* breaks the contract. *A* has a right to recover from *X* damages equivalent to the gain which *A* would have made if *X* had kept to his bargain.

A enters into an exactly similar contract with *N*, an official acting on behalf of some department of the government. *N*, or in fact the department, breaks the contract. *A* has a right to claim from the government, not, as in the case of the action against *X*, damages equivalent to the gain which he would have made if the contract had been kept, but only damages equivalent to the loss (if any) which *A* may have actually suffered by the breach of contract.[1] In other words, the state when it breaks a contract ought, according to French ideas, to suffer less than would a private wrong-doer. In the example here given, which is merely one among a hundred, the essential character of *droit administratif* becomes

[1] "*Un particulier qui n'exécute pas un marché doit à l'entrepreneur "une indemnité proportionnée au gain dont il le prive; le Code civil "l'établit ainsi. L'administration qui rompt un tel marché ne doit "d'indemnité qu'en raison de la perte éprouvée. C'est la règle de la "jurisprudence administrative. A moins que le droit ne s'y oppose, elle "tient que l'État, c'est-à-dire la collection de tous les citoyens, et le trésor "public, c'est-à-dire l'ensemble de tous les contribuables, doivent passer "avant le citoyen ou le contribuable isolés, défendant un intérêt individuel.*" —Vivien, *Études Administratives*, i. pp. 140-142.

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pparent—it is a body of law intended to preserve he privileges of the state.

Separation of powers.

The second of the general ideas on which rests he system of administrative law is the necessity f maintaining the so-called separation of powers *séparation des pouvoirs*), or, in other words, of pre- enting the government, the legislature, and the ourts from encroaching upon one another's province.

The expression "separation of powers," as applied by Frenchmen to the relations of the executive nd the Courts, with which alone we are here con- erned, may easily mislead. It means, in the mouth of a French statesman or lawyer, something different from what we mean in England by the "independence of the judges," or the like expressions. As interpreted by French history, by French legislation, and by the decisions of French tribunals, it means neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary Courts.[1] It were curious to follow out the historical growth of the whole theory as to the "separation of powers." It rests apparently upon Montesquieu's *Esprit des Lois*, Book XI. c. 6, and is in some sort the offspring of a double misconception; Montesquieu misunderstood on this point the principles and practice of the English constitution, and his doctrine was in turn, if not misunderstood, exaggerated and misapplied by the French statesmen of the Revolution, whose judgment was biassed, at once by knowledge of

[1] See Aucoc, *Droit Administratif*, ss. 20, 24.

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the inconveniences which had resulted from the interference of the Parliaments in matters of state, and by the characteristic and traditional desire to increase the force of the central government. The investigation, however, into the varying fate of a dogma which has undergone a different development on each side the Atlantic would lead us too far from our immediate topic. All that we need note is the extraordinary influence exerted in France, and in all countries which have followed French examples, by this part of Montesquieu's teaching, and the extent to which it underlies the political and legal institutions of the French Republic.

Characteristics.

To the combination of these two ideas may be traced the distinguishing characteristics of French administrative law.

Rights of state determined by special rules.

The first of these characteristics is (as the reader must already have perceived) that the relations of the government and its officials towards private citizens are regulated by a whole body of special rules, which are in reality laws, but which differ from the laws which govern the relation of one private person towards another. Nor is it unimportant to remark that the maxims of administrative law are not reduced to a code, but are what we should call in England "case law," and therefore possess that element of expansiveness which, whether it be counted a merit or a defect, is inherent in case law. Add to this that these maxims are "case law" made not by judges, but by government officials.

The second of these leading characteristics is that the ordinary tribunals have, speaking generally, no concern with any matter of administrative law,

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Law Courts without jurisdiction in matters concerning the state.

Questions of private right as between private citizens and all accusations of crime fall within the jurisdiction of the civil tribunals or (as we should say) of the common law Courts. But the ordinary judges are incompetent to pronounce judgment on any administrative act (*acte administratif*), that is, on any act done by any official, high or low, *bonâ fide* in his official character. The judges cannot pronounce upon the legality of decrees issued by the President of the Republic, as for example the decrees with reference to the "unauthorised congregations," nor upon the way in which these decrees have been put into execution by the government;[1] the judges cannot determine the meaning and legal effect, in case it be seriously disputed, of official documents, as for example of a letter addressed by a Minister of State to a subordinate or by a General to a person under his command;[2] the judges have, speaking generally, no jurisdiction as to questions arising on a contract made between a private person and a department of the government; the judges have no right to entertain an action brought by a private individual against an official for a wrong done in discharge of his official duties; thus if *X*, a cavalry officer, when under orders rides from one place to another at a review and negligently knocks down *A* a spectator, *A* cannot bring an action against *X* in the ordinary Courts.[3]

The assertion, however, that where an official in the discharge of his official duty injures a private individual, the person wronged cannot claim redress from

[1] Dalloz, *Jurisprudence Générale*, 1883, ii. p. 212.
[2] *Ibid.* iii. p. 94.
[3] *Ibid.* 1884, i. p. 220. This recalls the sixteenth Satire of Juvenal.

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the ordinary judges, does not mean or imply that a person who is thus aggrieved, say who is wrongfully arrested by a policeman acting under orders, or libelled in an official notice issued by a mayor, is without a remedy. The incompetence of the civil tribunals means only that, where any wrong has been done in the course of an official proceeding, redress must be sought from the proper official authorities, or, as they are called, the administrative tribunals (*tribunaux administratifs*).

Questions concerning state determined by administrative bodies.

For the third salient feature of French *droit administratif* is that it is administered by administrative Courts, at the head of which stands the Council of State. These so-called "Courts" have of comparatively recent times acquired to a certain extent a quasi-judicial character, and have adopted a quasi-judicial procedure.[1] We must take care however not to be deceived by names. The administrative authorities which decide all disputes in regard to matters of administrative law (*contentieux administratif*) may be called "tribunals," and may adopt forms moulded on the procedure of a Court, but they all of them, from the Council of the Prefect (*conseil de préfecture*) up to the Council of State, bear the more or less definite impress of an official or govern-

[1] This change in the constitution and procedure of the administrative Courts is an act of deference to the gradual spread of ideas like those which prevail in England. It is a change which is very far from universally approving itself to the judgment of Frenchmen. There has always existed a school of French publicists who have objected to referring administrative matters to bodies which had anything whatever of a judicial character and who have maintained that where the rights of the state are concerned the administration as representing the state should be the sole judge in its own cause. See Vivien, *Études Administratives*, i. p. 129.

mental character; they are composed of official persons, and, as is implied by the very pleas advanced in defence of withdrawing questions of administrative law from the civil Courts, look upon the disputes brought before them from a governmental point of view, and decide them in a spirit different from the feeling which influences the ordinary judges.[1] Since 1789 it has been once and again proposed that in France, as in England, rights against the government should, like rights against private persons, be determined by the judges. But French statesmen of all schools have invariably rejected such proposals, on the avowed ground that it is only from administrative tribunals that the interests of the state will receive due consideration. Official Courts are, in short, supported because they have an official bias.

The separation between judicial and administrative powers, combined with the coexistence of "ordinary" Courts and "administrative" Courts, results of necessity in conflicts of jurisdiction. A policeman acting under the orders of his superiors breaks into a monastery, seizes the property of the inmates, and expels them from the house—he is thereupon charged by the parties aggrieved with offences which English lawyers would call trespass and assault. He pleads that he is acting under government orders in execution of the decree which dissolved certain religious societies. The plaintiffs bring him before a civil Court. The question at once arises whether redress ought not to have been sought before the administrative tribunals; the objection is raised that the civil Court has no jurisdic-

[1] Aucoc, *Droit Administratif*, ss. 269-272; Vivien, *Études Administratives*, i. p. 140.

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tion. Here we have a "conflict." The natural idea of an Englishman is that this conflict must be determined by the ordinary judges; for that the judges of the land are the proper authorities to define the limits of their own jurisdiction. This view, which is so natural to an English lawyer, is radically opposed to the French conception of the due "separation of powers," since it must, if systematically carried out, enable the Courts to encroach on the province of the administration; it contradicts the principle laid down in the earlier stages of the Revolution and still recognised as valid by French law, that "administrative bodies must never be troubled in the exercise of their functions by any act whatever of the judicial power;"[1] nor can an Englishman, who recollects the cases on general warrants, deny that the judges have often interfered with the action of the administration. The worth of Montesquieu's doctrine is open to question, but, if his theory be sound, it is clear that judicial bodies ought not to be allowed to pronounce a final judgment upon the limits of their own authority.

Conflicts of jurisdiction determined by *Tribunal des Conflits.*

Hence arises the fourth and for our purpose the most noticeable feature of administrative law.

There exists in France a *Tribunal des Conflits*, or Court for deciding conflicts of jurisdiction. The special function of this body is to determine finally whether a given case, say an action against a policeman for an assault, comes within the jurisdiction of the civil Courts, or of the administrative Courts. On this matter of jurisdiction judges and officials are certain to form different opinions; a glance moreover at the

[1] See Aucoc, *Droit Administratif*, s. 24.

head *Compétence administrative*, in the *Recueil Périodique de Jurisprudence* by Dalloz, shows at once the constant occurrence of cases which make it necessary to fix the limits which divide the spheres of the judicial and of the administrative authorities.

The true nature therefore of administrative law depends in France upon the constitution of the *Tribunal des Conflits*. Is this "tribunal" a judicial body or an official body? An English critic will be slow to give a decisive answer to this question. He will remember how easily a Frenchman might misinterpret the working of English institutions, and might, for instance, suppose from the relation of the Chancellor to the Ministry that the Cabinet could influence the decision of an action entered in the Chancery Division of the High Court. But, subject to the hesitation that becomes any one who comments upon the effect of institutions, which are not those of his own country, an observer may assert with some confidence that the *Tribunal des Conflits* is at least as much of an official as of a judicial body. It follows therefore that the jurisdiction of the civil tribunals is in all matters which concern officials determined by persons who, if not actually part of the executive, are swayed by official sympathies, and who are inclined to consider the interest of the state, or of the government, more important than strict regard to the legal rights of individuals.

That this view is correct may be inferred from several considerations. Till a recent date the Council of State, a certainly more or less official body, was the final authority on questions of jurisdiction. So strong moreover was the bias of French law in favour of the

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administration, that up to 1870 all servants of the government possessed a kind of exemption from the jurisdiction of the Courts absolutely inconsistent with every English notion of equality before the law.

De Tocqueville's account of Art. 75 of Constitution of Year VIII.

De Tocqueville has given us an account of the protection extended over French functionaries in the following passage, which may be considered classical:—

"In the Year VIII of the French Republic a "constitution was drawn up in which the following "clause was introduced: 'Art. 75. All the agents of "the government below the rank of ministers can "only be prosecuted for offences relating to their "several functions by virtue of a decree of the Con-"seil d'État; in which case the prosecution takes "place before the ordinary tribunals.' This clause "survived the 'Constitution de l'An VIII,' and it is "still maintained in spite of the just complaints of "the nation. I have always found the utmost diffi-"culty in explaining its meaning to Englishmen or "Americans. They were at once led to conclude "that the Conseil d'État in France was a great "tribunal, established in the centre of the king-"dom, which exercised a preliminary and somewhat "tyrannical jurisdiction in all political causes. But "when I told them that the Conseil d'État was not "a judicial body, in the common sense of the term, "but an administrative council composed of men "dependent on the Crown, so that the King, after "having ordered one of his servants, called a Prefect, "to commit an injustice, has the power of command-"ing another of his servants, called a Councillor of "State, to prevent the former from being punished;

" when I demonstrated to them that the citizen who " has been injured by the order of the sovereign is " obliged to solicit from the sovereign permission to " obtain redress, they refused to credit so flagrant an " abuse, and were tempted to accuse me of falsehood " or of ignorance. It frequently happened before " the Revolution that a Parliament issued a warrant " against a public officer who had committed an " offence, and sometimes the proceedings were stopped " by the authority of the Crown, which enforced " compliance with its absolute and despotic will. It " is painful to perceive how much lower we are sunk " than our forefathers, since we allow things to pass " under the colour of justice and the sanction of the " law which violence alone could impose upon them."[1]

Its subsequent history.

Our author's subsequent investigations make it doubtful whether Article 75 of the Constitution of the Year VIII (1799) does more than reproduce in a stringent shape a principle inherited from the *ancien régime*;[2] it at any rate represents the permanent

[1] De Tocqueville, *Democracy in America*, i. (Translation), p. 101; *Œuvres Complètes*, i. pp. 174, 175.

[2] " *Ce qui apparaît . . . quand on étudie les paperasses administra-* " *tives, c'est l'intervention continuelle du pouvoir administratif dans la* " *sphère judiciaire. Les légistes administratifs nous disent sans cesse,* " *que le plus grand vice du gouvernement intérieur de l'ancien régime était* " *que les juges administraient. On pourrait se plaindre avec autant de* " *raison de ce que les administrateurs jugeaient. La seule différence est* " *que nous avons corrigé l'ancien régime sur le premier point, et l'avons* " *imité sur le second. J'avais eu jusqu'à présent la simplicité de croire* " *que ce que nous appelons la justice administrative était une création de* " *Napoléon. C'est du* pur ancien régime conservé ; *et la principe que* " *lors même qu'il s'agit de* contrat, *c'est-à-dire d'un engagement formel et* " *régulièrement pris entre un particulier et l'État, c'est à l'État à juger la* " *cause, cet axiome, inconnu chez la plupart des nations modernes, était* " *tenu pour aussi sacré par un intendant de l'ancien régime, qu'il pourrait* " *l'être de nos jours par le personnage qui ressemble le plus à celui-là, je veux* " *dire un préfet.*"—De Tocqueville, *Œuvres Complètes*, vi. pp. 221, 222.

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The one thing, however, which to an Englishman s more astonishing than the existence of Article 75 is he date and mode of its abolition. It survived the Consulate, the Napoleonic Empire, the Restoration, he Orleans Monarchy, the Republic of 1848, and the Second Empire; it was abolished on the 19th September 1870, by a government which had come into power through an insurrection, and which laid no claim to existence except the absolute necessity of protecting the nation against invasion. It is certainly trange that a provisional government occupied with he defence of Paris should have repealed a fundanental principle of French law. It is equally curious hat the repeal has been subsequently treated as valid. Of the motives which led men placed in emporary authority by the accidents of a revolution o carry through a legal innovation which, in appearnce at least, alters the whole position of French fficials, no foreign observer can form a certain

opinion. It is however a plausible conjecture that the repeal of Article 75 was lightly enacted and easily tolerated, because it effected a change more important in appearance than in reality, and did not after all gravely touch the position of French functionaries or the course of French administration.[1]

Effect of *droit administratif* on position of French officials.

We can now understand the way in which the existence of a *droit administratif* affects the whole legal position of French public servants, and renders it quite different from that of English officials.

Persons in the employment of the government, who form, be it observed, a much larger and more important part of the community than do the whole body of the servants of the English Crown, occupy in France a position in some respects resembling that of soldiers in England. For the breach of official discipline they are, we may safely assume, readily punishable in one form or another. But if like English soldiers they are subject to official discipline, they have what even soldiers in England do not possess, a very large amount of protection against legal proceedings for wrongs done to private citizens. The party wronged by an official must certainly seek relief, not from the judges of the land, but from some official Court. Before such a body the question which will be mainly considered is likely to be, not whether the complainant has been injured, but whether the

[1] For some confirmation of this view see Aucoc, *Droit Administratif*, ss. 419-426.

The admission, however, involved in the repeal of Article 75 of the general principle that officials are at any rate *primâ facie* liable for illegal acts, in the same way as private persons, marks, it is said by competent authorities, an important change in the public opinion of France, and is one among other signs of a tendency to look with jealousy on the power of the state.

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To this must be added a further consideration, to which for the sake of clearness no reference has hitherto been made. French law appears to recognise an indefinite class of "acts of state,"—acts, that is to say, which are done by the government, as matters of police, of high policy, of public security, and the like, and acts of this class do not fall within the control either of the administrative or of any other Courts.[2]

[1] See Dalloz, *Jurisprudence Générale*, 1880, iii. p. 121; *ibid.* 1881, iii. pp. 81, 91; *ibid.* 1881, ii. pp. 32, 33; *ibid.* 1883, ii. p. 212; *ibid.* 1880, iv. p. 23.

[2] See, however, p. 211, note 2, *ante*.

It would, for example, appear that in questions of extradition, as regards persons who are not French citizens, the government can act freely on its own discretion, and that a foreigner threatened with expulsion or expelled from French territory by orders of the government will not be able to obtain protection or redress in any French Court whatever; the executive possesses under the French constitution "prerogatives" —no other word so well expresses the idea—which are above and beyond, rather than opposed to, the law of the land.

Effect of *droit administratif* on position of judges.

What may be the precise limits which the system of administrative law taken together with the authority ascribed in France to the executive in matters of state imposes on the jurisdiction of the civil tribunals, no foreigner can pronounce with certainty. These limitations are however, as we have seen, in many instances very strict, and are certainly sufficient to prevent the judges of the land from pronouncing judgment on wrongs, not amounting to actual crimes, done by officials to private citizens. These restrictions on the authority of the Courts must, at any rate as an Englishman would think, diminish the moral influence of the whole judicial body, and deprive the French judicature of that dignity which the English Bench have derived from their undoubted power to intervene, indirectly indeed, but none the less efficiently, in matters of state. The condemnation of general warrants—a condemnation which, whatever be the French law of arrest, could not (it would seem) be at the present day pronounced by any Court in France—did as much in the last century to raise the reputation of the Bench as to protect the freedom of

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the subject. Our judges would with difficulty retain the reverence with which their traditions surround them if the decisions, even of the House of Lords, were, whenever they were alleged to interfere with the prerogative of the Crown or the discretionary powers of the Ministry, liable to be invalidated by some official body. The separation of powers, as the doctrine is interpreted in France, means, it would seem to an Englishman, the powerlessness of the Courts in any conflict with the executive. However this may be, it assuredly means the protection of official persons from the liabilities of ordinary citizens.

Contrast with position of servants of Crown in England.

Compare for a moment with the position of French officials under the system of *droit administratif* the situation of servants of the Crown in England.

Among modern Englishmen the political doctrines which have in France created the system of *droit administratif* are all but unknown. Our law bears very few traces indeed of the idea that when questions arise between the state or, as we should say, the Crown or its servants and private persons, the interests of the government should be in any sense preferred or the acts of its agents claim any special protection.[1] Our laws, again, lend no countenance to the dogma of the "separation of powers" as that

[1] There are some faint traces of some such principle in the existence of proceedings by "petition of right" and in the statutory advantages of notice of action and the like, which under many Acts of Parliament are given to constables and others "acting in pursuance of" some statutory power. The extent to which even these very limited advantages often prevent actions against subordinate officials may give us some slight conception of the way in which civil proceedings must be restrained in France by the incompetence of the Courts to deal with [illegible]

doctrine is understood by Frenchmen. The common law Courts have constantly hampered the action of the executive, and by issuing the writ of *habeas corpus* as well as by other means do in fact exert a strict supervision over the proceedings of the Crown and its servants.

Hence in modern England the civil servants of the Crown are not, even as regards their official duties, subject to any peculiar kind of law or amenable to special tribunals. They are persons employed and paid to do work for the government; they do not constitute anything like what foreigners call an "official hierarchy."

This absence of amenability to special tribunals is not wholly beneficial. Gross violations of duty by public servants are frequently not punishable. A copyist in a public office sells to the newspapers a secret diplomatic document of the highest importance. Imagination can hardly picture a more flagrant breach of duty. But there are apparently no means available for punishing the culprit. He may perhaps be put on trial for larceny on the ground of his having stolen the paper on which the communication of state is written; but a prisoner tried for a crime which he has in fact not committed, because the offence of which he is really guilty is not a crime, may count upon acquittal. But if a civil servant may with us escape legal punishment for breach of his duties to the state, the fact that he serves the Crown gives him in general no protection against actions for wrongs to private persons. *Bonâ fide* obedience to the orders of superiors is not a defence available to a subordinate who, in the discharge of his functions as a

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government officer, has invaded the legal rights of the humblest individual. Officials, like everybody else, are accountable for their conduct to a Court of Law; and to a Court, be it noted, where the verdict is given by a jury.

In this point of view few things are more instructive than an examination of the actions which have been brought against officers of the Board of Trade for detaining ships about to proceed to sea. Under the Merchant Shipping Act, 1876, the Board are bound to detain any ship which from its unsafe and unseaworthy condition cannot proceed to sea without serious danger to human life.[1] Most persons would suppose that the officials of the Board, as long as they, *bonâ fide*, and without malice or corrupt motive, endeavoured to carry out the provisions of the statute, would be safe from an action at the hands of a shipowner. This, however, is not so. The Board and its officers have more than once been sued with success.[2] They have never been accused of either malice or negligence, but the mere fact that the Board act in an administrative capacity is not a protection to the Board, nor is mere obedience to the orders of the Board an answer to an action against its servants. Any deviation moreover from the exact terms of the Act—the omission of the most unmeaning formality—may make every person high and low, concerned in the detention of the ship a wrong-doer. The question, on the answer to which the decision in each instance at bottom depends, is whether there was reasonable cause for detaining the

[1] Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), s. 6.

[2] See *Thompson* v. *Farrer*, 9 Q. B. D. (C. A.), 372.

vessel, and this inquiry is determined by a jury who sympathise more with the losses of a shipowner, whose ship may have been unjustly detained, than with the zeal of an inspector anxious to perform his duty and to prevent loss of life. The result has (it is said) been to render the provisions of the Merchant Shipping Acts, with regard to the detention of unseaworthy ships, nugatory. Courts and juries are biassed against the government. A technical question is referred for decision, from persons who know something about the subject, and are impartial, to persons who are both ignorant and prejudiced. The government moreover, which has no concern but the public interest, is placed in the false position of a litigant fighting for his own advantage. These things ought to be noticed, for they explain, if they do not justify, the tenacity with which statesmen, as partial as De Tocqueville to English ideas of government, have clung to the conviction that administrative questions ought to be referred to administrative Courts. With the practical results however of the different positions assigned to officials under French and under English law, and with the merits or demerits of either system, we need not greatly concern ourselves; the one point which should be impressed upon every student is that the *droit administratif* of France rests upon political principles at variance with the ideas which are embodied in our existing constitution, and contradicts modern English convictions as to the rightful supremacy or rule of the law of the land.

It will be observed that it is "modern" English notions which are contrasted with the ideas now

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Droit administratif opposed to modern English notions, but not to ideas current in sixteenth and seventeenth centuries.

prevalent in continental states. The reason why the opposition between the two is drawn in this form deserves notice. At a period which historically is not very remote from us, the ideas as to the position of the Crown which were current, if not predominant in England, bore a very close analogy to the doctrines which have given rise to the *droit administratif* of France.[1]

Similar beliefs moreover necessarily produced similar results, and there was a time when it must have seemed possible that what we now call administrative law should become a permanent part of English institutions. For from the accession of the Tudors till the final expulsion of the Stuarts the Crown and its servants maintained and put into practice, with more or less success and with varying degrees of popular approval, views of government essentially similar to the theories which under different forms have been accepted by the French people. The personal failings of the Stuarts and the confusion caused by the combination of a religious with a political movement have tended to mask the true character of the legal and constitutional issues raised by the political contests of the seventeenth century. A lawyer who regards the matter from an exclusively legal point of view is tempted to assert that the real subject in dispute between statesmen such as Bacon and Wentworth on the one hand and Coke or Eliot on the other, was whether a strong administration of the continental type should or

[1] This is illustrated by the similarity between the views at one time prevailing both in England and on the continent as to the relation between the government and the press. See pp. 244, 245 *ante*.

should not be permanently established in England. Bacon and men like him no doubt underrated the risk that an increase in the power of the Crown should lead to the establishment of a despotism. But advocates of the prerogative did not (it may be supposed) intend to sacrifice the liberties or invade the ordinary private rights of citizens; they were struck with the evils flowing from the conservative legalism of Coke, and with the necessity for enabling the Crown as head of the nation to cope with the selfishness of powerful individuals and classes. They wished, in short, to give the government the sort of rights conferred on a foreign executive by the principles of administrative law. Hence for each feature of French *droit administratif* one may find some curious analogy either in the claims put forward or in the institutions favoured by the Crown lawyers of the seventeenth century.

The doctrine propounded under various metaphors by Bacon that the prerogative was something beyond and above the ordinary law is like the foreign doctrine that in matters of high policy the administration has a discretionary authority which cannot be controlled by any Court. The celebrated dictum that the judges, though they be "lions," yet should be "lions under "the throne, being circumspect that they do not "check or oppose any points of sovereignty,"[1] is a curious anticipation of the maxim formulated by French revolutionary statesmanship that the judges are under no circumstances to disturb the action of the administration, and would, if logically worked out, have led to the exemption of every administrative

[1] Gardiner, *History of England*, iii. p. 2.

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act, or, to use English terms, of every act alleged to be done in virtue of the prerogative from judicial cognisance. The constantly increasing power of the Star Chamber and of the Council gave practical expression to prevalent theories as to the Royal prerogative, and it is hardly fanciful to compare these Courts, which were in reality portions of the executive government, with the *Conseil d'état* and other *Tribunaux administratifs* of France. Nor is a parallel wanting to the celebrated Article 75 of the Constitution of the Year VIII.[1] This parallel is to be found in Bacon's attempt to prevent the judges by means of the writ *De non procedendo Rege inconsulto* from proceeding with any case in which the interests of the Crown were concerned. "The working of this "writ," observes Mr. Gardiner, "if Bacon had obtained "his object, would have been to some extent "analogous to that provision which has been found "in so many French constitutions, according to "which no agent of the Government can be sum-"moned before a tribunal, for acts done in the exercise "of his office, without a preliminary authorisation of "the Council of State. The effect of the English "writ being confined to cases where the King himself "was supposed to be injured, would have been of less "universal application, but the principle on which it "rested would have been equally bad."[2] The principle moreover admitted of unlimited extension, and this, we may add, was perceived by Bacon. "The "writ," he writes to the King, "is a mean provided "by the ancient law of England to bring any case

[1] See p. 316, *ante*.

[2] Gardiner, *History of England*, p. 7, note 2.

" that may *concern your Majesty in profit or power* " *from the ordinary Benches, to be tried and judged* " *before the Chancellor of England,* by the ordinary " and legal part of this power. And your Majesty " knoweth *your Chancellor is ever a principal* " *counsellor and instrument of monarchy, of im-* " *mediate dependence on the king; and therefore like* " *to be a safe and tender guardian of the regal* " *rights.*"[1] Bacon's innovation would, if successful, have formally established the fundamental dogma of administrative law that administrative questions must be determined by administrative bodies.

The analogy between the administrative ideas which still prevail on the Continent[2] and the conception of the prerogative which was maintained by the English Crown in the seventeenth century has considerable speculative interest. That the administrative ideas supposed by many French writers to have been originated by the statesmanship of the great Revolution or of the first Empire are to a great extent developments of the traditions and habits of the French monarchy is almost past a doubt, and it is a curious inquiry how far the efforts made by the Tudors or Stuarts to establish a strong government were influenced by foreign examples. This, however, is a problem for historians. A lawyer may content himself with noting that French history throws light on the causes both of the partial success and of the ultimate failure of the attempt to establish in England a strong administrative system. The endeavour had

[1] Abbott, *Francis Bacon*, p. 234.

[2] It is worth noting that the system of "administrative law," though more fully developed in France than elsewhere, exists in one form or another in most of the Continental States.

Part II. a partial success, because circumstances, similar to those which made French monarchs ultimately despotic, tended in England during the sixteenth and part of the seventeenth century to increase the influence of the Crown. The attempt ended in failure, partly because of the personal deficiencies of the Stuarts, but chiefly because the whole scheme of administrative law was opposed to those habits of equality before the law which had long been essential characteristics of English institutions.

CHAPTER XIII

RELATION BETWEEN PARLIAMENTARY SOVEREIGNTY AND THE RULE OF LAW

THE sovereignty of Parliament and the supremacy of the law of the land—the two principles which pervade the whole of the English constitution — may appear to stand in opposition to each other, or to be at best only counterbalancing forces. But this appearance is delusive; the sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise, and thus increases the authority, of Parliamentary sovereignty.

Parliamentary sovereignty favours rule of law.

The sovereignty of Parliament favours the supremacy of the law of the land.

That this should be so arises in the main from two characteristics or peculiarities which distinguish the English Parliament from other sovereign powers.

The first of these characteristics is that the commands of Parliament (consisting as it does of the Crown, the House of Lords, and the House of Commons) can be uttered only through the combined action of its three constituent parts, and must therefore always take the shape of formal and deliberate

Part II. legislation. The will of Parliament[1] can be expressed only through an Act of Parliament.

This is no mere matter of form; it has most important practical effects. It prevents those inroads upon the law of the land which a despotic monarch, such as Louis XIV., Napoleon I., or Napoleon III., might effect by ordinances or decrees, or which the different constituent assemblies of France, and above all the famous Convention, carried out by sudden resolutions. The principle that Parliament speaks only through an Act of Parliament greatly increases the authority of the judges. A Bill which has passed into a statute immediately becomes subject to judicial interpretation, and the English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment. An English judge will take no notice of the resolutions of either House, of anything which may have passed in debate (a matter of which officially he has no cognisance), or even of the changes which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent. All this, which seems natural enough to an English lawyer, would greatly surprise many foreign legists, and no doubt often does give a certain narrowness to the judicial construction of statutes. It contributes greatly however both (as

[1] A strong, if not the strongest, argument in favour of the so-called "bi-cameral" system, is to be found in the consideration that the coexistence of two legislative chambers prevents the confusion of resolutions passed by either House with laws, and thus checks the substitution of the arbitrary will of an assembly for the supremacy of the ordinary law of the land. Whoever wishes to appreciate the force of this argument should weigh well the history, not only of the French Convention but also of the English Long Parliament.

I have already pointed out) to the authority of the judges and to the fixity of the law.[1]

The second of these characteristics is that the English Parliament as such has never, except at periods of revolution, exercised direct executive power or appointed the officials of the executive government.

No doubt in modern times the House of Commons has in substance obtained the right to designate for appointment the Prime Minister and the other members of the Cabinet. But this right is, historically speaking, of recent acquisition, and is exercised in a very roundabout manner; its existence does not affect the truth of the assertion that the Houses of Parliament do not directly appoint or dismiss the servants of the state; neither the House of Lords nor the House of Commons, nor both Houses combined, could even now issue a direct order to a military officer, a constable, or a tax-collector; the servants of the state are still in name what they once were in reality—"servants of the Crown;" and, what is worth careful notice, the attitude of Parliament towards government officials was determined originally, and is still regulated, by considerations and feelings belonging to a time when the "servants of the Crown" were dependent upon the King, that is, upon a power which naturally excited the jealousy and vigilance of Parliament.

Hence several results all indirectly tending to support the supremacy of the law. Parliament, though

[1] The principle that the sovereign legislature can express its commands only in the particular form of an Act of Parliament originates of course in historical causes; it is due to the fact that an Act of Parliament was once in reality, what it still is in form, a law "enacted by the King by and with the advice and consent of the Lords and Commons in Parliament assembled."

Part II.

sovereign, unlike a sovereign monarch who is not only a legislator but a ruler, that is, head of the executive government, has never been able to use the powers of the government as a means of interfering with the regular course of law;[1] and what is even more important, Parliament has looked with disfavour and jealousy on all exemptions of officials from the ordinary liabilities of citizens or from the jurisdiction of the ordinary Courts; Parliamentary sovereignty has been fatal to the growth of "administrative law." The action, lastly, of Parliament has tended as naturally to protect the independence of the judges, as that of other sovereigns to protect the conduct of officials. It is worth notice that Parliamentary care for judicial independence has in fact stopped just at that point where on *a priori* grounds it might be expected to end. The judges are not in strictness irremovable; they can be removed from office on an address of the two Houses; they have been made by Parliament independent of every power in the state except the Houses of Parliament.

Tendency to support rule of law often not found in foreign representative assemblies.

The idea may suggest itself to a reader that the characteristics or peculiarities of the English Parliament on which I have just dwelt must now be common to most of the representative assemblies which exist in continental Europe. The French National Assembly, for example, bears a considerable external resemblance to our own Parliament. It is influenced however by a different spirit; it is the heir, in more ways than one, of the Bourbon Mon-

[1] Contrast with this the way in which even towards the end of the eighteenth century French Kings interfered with the action of the Courts.

archy and the Napoleonic Empire. It is apparently, though on this point a foreigner must speak with hesitation, inclined to interfere in the details of administration. It does not look with special favour on the independence or authority of the ordinary judges. It shows no disapprobation of the system of *droit administratif* which Frenchmen—very likely with truth—regard as an institution suited to their country, and it certainly leaves in the hands of the government wider executive and even legislative powers than the English Parliament has ever conceded either to the Crown or to its servants. What is true of France is true under a different form of many other continental states, such, for example, as Switzerland or Prussia. The sovereignty of Parliament as developed in England supports the supremacy of the law. But this is certainly not true of all the countries which now enjoy representative or Parliamentary government.

Rule of law favours Parliamentary sovereignty.

The supremacy of the law necessitates the exercise of Parliamentary sovereignty.

The rigidity of the law constantly hampers (and sometimes with great injury to the public) the action of the executive, and from the hard and fast rules of strict law, as interpreted by the judges, the government can escape only by obtaining from Parliament the discretionary authority which is denied to the Crown by the law of the land. Note with care the way in which the necessity for discretionary powers brings about the recourse to exceptional legislation. Under the complex conditions of modern life no government can in times of disorder or of war keep the peace at home, or perform its duties towards

Part II. foreign powers, without occasional use of arbitrary authority. During periods, for instance, of social disturbance you need not only to punish conspirators but also to arrest men who are reasonably suspected of conspiracy; foreign revolutionists are known to be spreading sedition throughout the land; order can hardly be maintained unless the executive can expel aliens. When two foreign nations are at war, or when civil contests divide a friendly country into two hostile camps, it is impossible for England to perform her duties as a neutral unless the Crown has legal authority to put a summary check to the attempts of English sympathisers to help one or other of the belligerents. Foreign nations, again, feel aggrieved if they are prevented from punishing theft and homicide —if, in short, their whole criminal law is weakened because every scoundrel can ensure impunity for his crimes by an escape to England. But this result must inevitably ensue if the English executive has no authority to surrender French or German offenders to the government of France or of Germany. The English executive needs therefore the right to exercise discretionary powers, but the Courts must prevent, and will prevent at any rate where persons liberty is concerned, the exercise by the government of any sort of discretionary power. The Crown cannot, except under statute, expel from England any alien whatever, even though he were a murderer who, after slaughtering a whole family at Boulogne had on the very day crossed red-handed to Dover. The executive therefore must ask for, and always obtains, aid from Parliament. An Alien Act enables the Ministry in times of disturbance to expel any

foreigner from the country; a Foreign Enlistment Act makes it possible for the Ministry to check intervention in foreign contests or the supply of arms to foreign belligerents. Extradition Acts empower the government at the same time to prevent England from becoming a city of refuge for foreign criminals, and to co-operate with foreign states in that general repression of crime in which the whole civilised world has an interest. Nor have we yet exhausted the instances in which the rigidity of the law necessitates the intervention of Parliament. There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which the government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity. A statute of this kind is (as already pointed out [1]) the last and supreme exercise of Parliamentary sovereignty. It legalises illegality; it affords the practical solution of the problem which perplexed the statesmanship of the sixteenth and seventeenth centuries, how to combine the maintenance of law and the authority of the Houses of Parliament with the free exercise of that kind of discretionary power or prerogative which, under some shape or other, must at critical junctures be wielded by the executive government of every civilised country.

This solution may be thought by some critics a merely formal one, or at best only a substitution of the despotism of Parliament for the prerogative of the Crown. But this idea is erroneous. The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament

[1] See pp. 47, 48, 218-222, *ante*.

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places the government, even when armed with the widest authority, under the supervision, so to speak, of the Courts. Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges. Parliament is supreme legislator, but from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land, and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials or to the Houses of Parliament, if the Houses were called upon to interpret their own enactments. In foreign countries, and especially in France, administrative ideas—notions derived from the traditions of a despotic monarchy—have restricted the authority and to a certain extent influenced the ideas of the judges. In England judicial notions have modified the action and influenced the ideas of the executive government. By every path we come round to the same conclusion, that Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality.

PART III

THE CONNECTION BETWEEN THE LAW OF THE CONSTITUTION AND THE CONVENTIONS OF THE CONSTITUTION

CHAPTER XIV

NATURE OF CONVENTIONS OF CONSTITUTION

Questions remaining to be answered.

In the Introduction to this work stress was laid upon the essential distinction between the "law of the constitution," which, consisting (as it does) of rules enforced or recognised by the Courts, makes up a body of "laws" in the proper sense of that term, and the "conventions of the constitution," which, consisting (as they do) of customs, practices, maxims, or precepts which are not enforced or recognised by the Courts, make up a body not of laws, but of constitutional or political ethics; and it was further urged that the law, not the morality of the constitution, forms the proper subject of legal study.[1] In accordance with this view, the reader's attention has been hitherto exclusively directed to the meaning and applications of two principles which pervade the law of the constitution, namely, the Sovereignty of Parliament[2] and the Rule of Law.[3]

But a lawyer cannot master even the legal side of the English constitution without paying some attention to the nature of those constitutional understandings which necessarily engross the attention of

[1] See pp. 30, 31, *ante*. [2] See Part I. [3] See Part II.

Part III.

historians or of statesmen. He ought to ascertain, at any rate, how; if at all, the law of the constitution is connected with the conventions of the constitution; and a lawyer who undertakes this task will soon find that in so doing he is only following one stage farther the path on which we have already entered, and is on the road to discover the last and most striking instance of that supremacy of the law which gives to the English polity the whole of its peculiar colour.

My aim therefore throughout the remainder of this book is to define, or ascertain, the relation or connection between the legal and the conventional elements in the constitution, and to point out the way in which a just appreciation of this connection throws light upon several subordinate questions or problems of constitutional law.

This end will be attained if an answer is found to each of two questions: What is the nature of the conventions or understandings of the constitution? What is the force or (in the language of jurisprudence) the "sanction" by which is enforced obedience to the conventions of the constitution? These answers will themselves throw light on the subordinate matters to which I have made reference.

Nature of constitutional understandings.

The salient characteristics, the outward aspects so to speak of the understandings which make up the constitutional morality of modern England, can hardly be better described than in the words of Mr. Freeman:—

"We now have a whole system of political "morality, a whole code of precepts for the guidance of "public men, which will not be found in any page "of either the statute or the common law, but which "are in practice held hardly less sacred than any

" principle embodied in the Great Charter or in the " Petition of Right. In short, by the side of our " written Law, there has grown up an unwritten or " conventional Constitution. When an Englishman " speaks of the conduct of a public man being consti- " tutional or unconstitutional, he means something " wholly different from what he means by conduct " being legal or illegal. A famous vote of the House " of Commons, passed on the motion of a great states- " man, once declared that the then Ministers of the " Crown did not possess the confidence of the House " of Commons, and that their continuance in office " was therefore at variance with the spirit of the con- " stitution. The truth of such a position, accord- " ing to the traditional principles on which public men " have acted for some generations, cannot be disputed ; " but it would be in vain to seek for any trace of such " doctrines in any page of our written Law. The " proposer of that motion did not mean to charge the " existing Ministry with any illegal act, with any act " which could be made the subject either of a prose- " cution in a lower court or of impeachment in the " High Court of Parliament itself. He did not mean " that they, Ministers of the Crown, appointed " during the pleasure of the Crown, committed " any breach of the Law of which the Law could " take cognisance, by retaining possession of their " offices till such time as the Crown should think " good to dismiss them from those offices. What he " meant was that the general course of their policy " was one which to a majority of the House of Com- " mons did not seem to be wise or beneficial to the " nation, and that therefore, according to a conven-

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" tional code as well understood and as effectual as " the written Law itself, they were bound to resign " offices of which the House of Commons no longer " held them to be worthy."[1]

The one exception which can be taken to this picture of our conventional constitution is the contrast drawn in it between the " written law " and the " unwritten constitution ; " the true opposition, as already pointed out, is between laws properly so called, whether written or unwritten, and understandings, or practices, which, though commonly observed, are not laws in any true sense of that word at all. But this inaccuracy is hardly more than verbal, and we may gladly accept Mr. Freeman's words as a starting-point whence to inquire into the nature or common quality of the maxims which make up our body of constitutional morality.

Examples of constitutional understandings.

The following are examples[2] of the precepts to which Mr. Freeman refers, and belong to the code by which public life in England is (or is supposed to be) governed. " A Ministry which is outvoted in the House of Commons are in many cases bound to retire from office." " A Cabinet, when outvoted on any vital question, may appeal once to the country by means of a dissolution." " If an appeal to the electors goes against the Ministry they are bound to retire from office, and have no right to dissolve Parliament a second time." " The Cabinet are responsible to Parliament as a body, for the general conduct of affairs." " They are further responsible to an extent, not however very definitely fixed, for the appointments made by any of their number, or to speak in

[1] Freeman, *Growth of the English Constitution* (1st ed.), pp. 109, 110.

[2] See, for further examples, pp. 25-27, *ante*.

more accurate language, made by the Crown under the advice of any member of the Cabinet." "The party who for the time being command a majority in the House of Commons, have (in general) a right to have their leaders placed in office." "The most influential of these leaders ought (generally speaking) to be the Premier, or head of the Cabinet." These are precepts referring to the position and formation of the Cabinet. It is however easy to find constitutional maxims dealing with other topics. "Treaties can be made without the necessity for any Act of Parliament; but the Crown, or in reality the Ministry representing the Crown, ought not to make any treaty which will not command the approbation of Parliament." "The foreign policy of the country, the proclamation of war, and the making of peace ought to be left in the hands of the Crown, or in truth of the Crown's servants. But in foreign as in domestic affairs, the wish of the two Houses of Parliament or (when they differ) of the House of Commons ought to be followed." "The action of any Ministry would be highly unconstitutional if it should involve the proclamation of war, or the making of peace, in defiance of the wishes of the House." "If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought, at some point, not definitely fixed, to give way, and should the Peers not yield, and the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown, or of its responsible advisers, to create or to threaten to create enough new Peers to override the opposition of the House of Lords, and thus restore harmony between the two branches of the

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legislature."[1] "Parliament ought to be summoned for the despatch of business at least once in every year." "If a sudden emergency arise, *e.g.* through the outbreak of an insurrection, or an invasion by a foreign power, the Ministry ought, if they require additional authority, at once to have Parliament convened and obtain any powers which they may need for the protection of the country. Meanwhile Ministers ought to take every step, even at the peril of breaking the law, which is necessary either for restoring order or for repelling attack, and (if the law of the land is violated) must rely for protection on Parliament passing an Act of Indemnity."

Common characteristic of constitutional understandings.

These rules (which I have purposely expressed in a lax and popular manner), and a lot more of the same kind, make up the constitutional morality of the day. They are all constantly acted upon, and, since they cannot be enforced by any Court of Law, have no claim to be considered laws. They are multifarious, differing as it might at first sight appear from each other not only in importance but in general character and scope. They will be found however, on careful examination, to possess one common quality or property; they are all, or at any rate most of them, rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised; and this characteristic will be found on examination to be the trait common not only to all the rules already enumerated, but to by far the greater part (though not quite to the whole) of the conventions of the constitution. This matter however requires

[1] See however Hearn, *Government of England* (2d ed.), p. 178.

for its proper understanding some further explanation.

Constitutional conventions are mainly rules for governing exercise of prerogative.

The discretionary powers of the government mean every kind of action which can legally be taken by the Crown, or by its servants, without the necessity for applying to Parliament for new statutory authority. Thus no statute is required to enable the Crown to dissolve or to convoke Parliament, to make peace or war, to create new Peers, to dismiss a Minister from office or to appoint his successor. The doing of all these things lies legally at any rate within the discretion of the Crown; they belong therefore to the discretionary authority of the government. This authority may no doubt originate in Parliamentary enactments, and in a limited number of cases actually does so originate. Thus the Naturalisation Act, 1870, gives to a Secretary of State the right under certain circumstances to convert an alien into a naturalised British subject; and the Extradition Act, 1870, enables a Secretary of State (under conditions provided by the Act) to override the ordinary law of the land and hand over a foreigner to his own government for trial. With the exercise however of such discretion as is conferred on the Crown or its servants by Parliamentary enactments we need hardly concern ourselves. The mode in which such discretion is to be exercised is, or may be, more or less clearly defined by the Act itself, and is often so closely limited as in reality to become the subject of legal decision, and thus pass from the domain of constitutional morality into that of law properly so called. The discretionary authority of the Crown originates generally, not in Act of Parlia-

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ment, but in the "prerogative"—a term which has caused more perplexity to students than any other expression referring to the constitution. The "prerogative" appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. The King was originally in truth what he still is in name, "the sovereign," or, if not strictly the "sovereign" in the sense in which jurists use that word, at any rate by far the most powerful part of the sovereign power. In 1791 the House of Commons compelled the government of the day, a good deal against the will of Ministers, to put on trial Mr. Reeves, the learned author of the *History of English Law*, for the expression of opinions meant to exalt the prerogative of the Crown at the expense of the authority of the House of Commons. Among other statements for the publication of which he was indicted, was a lengthy comparison of the Crown to the trunk, and the other parts of the constitution to the branches and leaves of a great tree. This comparison was made with the object of drawing from it the conclusion that the Crown was the source of all legal power, and that while to destroy the authority of the Crown was to cut down the noble oak under the cover of which Englishmen sought refuge from the storms of Jacobinism, the House of Commons and other institutions were but branches and leaves which might be lopped off without serious damage to the tree.[1] The publication of Mr. Reeves's theories

[1] See 26 St. Tr. 530-534.

during a period of popular excitement may have been injudicious. But a jury, one is happy to know, found that it was not seditious; for his views undoubtedly rested on a sound basis of historical fact.

The power of the Crown was in truth anterior to that of the House of Commons. From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or by her Ministers. Every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative. If therefore we omit from view (as we conveniently may do) powers conferred on the Crown or its servants by Parliamentary enactments, as for example under an Alien Act, we may use the term "prerogative" as equivalent to the discretionary authority of the executive, and then lay down that the conventions of the constitution are in the main precepts for determining the mode and spirit in which the prerogative is to be exercised, or (what is really the same thing) for fixing the manner in which any transaction which can legally be done in virtue of the Royal prerogative (such as the making of war or the declaration of peace) ought to be carried out. This statement holds good, it should be noted, of all the discretionary powers exercised by the executive, otherwise than under statutory authority: it applies to acts

Part III. really done by the Queen herself in accordance with her personal wishes, to transactions (which are of more frequent occurrence than modern constitutionalists are disposed to admit) in which both the Queen and her Ministers take a real part, and also to that large and constantly increasing number of proceedings which, though carried out in the Queen's name, are in truth wholly the acts of the Ministry. The conventions of the constitution are in short rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown, whether these powers are exercised by the Queen herself or by the Ministry. That this is so may be seen by the ease and the technical correctness with which such conventions may be expressed in the form of regulations in reference to the exercise of the prerogative. Thus, to say that a Cabinet when outvoted on any vital question are bound in general to retire from office, is equivalent to the assertion, that the prerogative of the Crown to dismiss its servants at the will of the King must be exercised in accordance with the wish of the Houses of Parliament; the statement that Ministers ought not to make any treaty which will not command the approbation of the Houses of Parliament, means that the prerogative of the Crown in regard to the making of treaties—what the Americans call the "treaty-making power"—ought not to be exercised in opposition to the will of Parliament. So, again, the rule that Parliament must meet at least once a year, is in fact the rule that the Crown's legal right or prerogative to call Parliament together at the monarch's pleasure must be so exercised that Parliament meet once a year.

This analysis of constitutional understandings is

Chapter XIV.

Some constitutional conventions refer to exercise of Parliamentary privilege.

open to the one valid criticism, that, though true as far as it goes, it is obviously incomplete; for there are some few constitutional customs or habits which have no reference to the exercise of the royal power. Such, for example, is the understanding—a very vague one at best—that in case of a permanent conflict between the will of the House of Commons and the will of the House of Lords the Peers must at some point give way to the Lower House. Such, again, is, or at any rate was, the practice by which the judicial functions of the House of Lords are discharged solely by the Law Lords, or the understanding under which Divorce Acts were treated as judicial and not as legislative proceedings. Habits such as these are at bottom customs or rules meant to determine the mode in which one or other or both of the Houses of Parliament shall exercise their discretionary powers, or, to use the historical term, their "privileges." The very use of the word "privilege" is almost enough to show us how to embrace all the conventions of the constitution under one general head. Between "prerogative" and "privilege" there exists a close analogy: the one is the historical name for the discretionary authority of the Crown; the other is the historical name for the discretionary authority of each House of Parliament. Understandings then which regulate the exercise of the prerogative determine, or are meant to determine, the way in which one member of the sovereign body, namely, the Crown, should exercise its discretionary authority; understandings which regulate the exercise of privilege determine, or are meant to determine, the way in which the other members of the sovereign body

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should each exercise their discretionary authority The result follows, that the conventions of the constitution, looked at as a whole, are customs, or understandings, as to the mode in which the several members of the sovereign legislative body, which, as it will be remembered, is the "King in Parliament,"[1] should each exercise their discretionary authority, whether it be termed the prerogative of the Crown or the privileges of Parliament. Since, however, by far the most numerous and important of our constitutional understandings refer at bottom to the exercise of the prerogative, it will conduce to brevity and clearness if we treat the conventions of the constitution, as rules or customs determining the mode in which the discretionary power of the executive, or in technical language the prerogative, ought (*i.e.* is expected by the nation) to be employed.

Aim of constitutional understandings.

Having ascertained that the conventions of the constitution are (in the main) rules for determining the exercise of the prerogative, we may carry our analysis of their character a step farther. They have all one ultimate object. Their end is to secure that Parliament, or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the state—the majority of the electors or (to use popular though not quite accurate language) the nation.

At this point comes into view the full importance of the distinction already insisted upon[2] between 'legal" sovereignty and "political" sovereignty Parliament is, from a merely legal point of view, the

[1] See p. 37, *ante.*

[2] See pp. 69, 70, *ante.*

absolute sovereign of the British Empire, since every Act of Parliament is binding on every Court throughout the British dominions, and no rule, whether of morality or of law, which contravenes an Act of Parliament, binds any Court throughout the realm. But if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, *i.e.* of the electoral body, or of the nation. That the conduct of the different parts of the legislature should be determined by rules meant to secure harmony between the action of the legislative sovereign and the wishes of the political sovereign, must appear probable from general considerations. If the true ruler or political sovereign of England were, as was once the case, the King, legislation might be carried out in accordance with the King's will by one of two methods. The Crown might itself legislate, by royal proclamations, or decrees; or some other body, such as a Council of State or Parliament itself, might be allowed to legislate as long as this body conformed to the will of the Crown. If the first plan were adopted, there would be no room or need for constitutional conventions. If the second plan were adopted, the proceedings of the legislative body must inevitably be governed by some rules meant to make certain that the Acts of the legislature should not contravene the will of the Crown. The electorate is in fact the sovereign of England. It is a body which does not, and from its nature hardly can, itself legislate, and which, owing chiefly to historical causes, has left in existence a theoretically supreme legislature. The result of this

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state of things would naturally be that the conduct of the legislature, which (*ex hypothesi*) cannot be governed by laws, should be regulated by understandings of which the object is to secure the conformity of Parliament to the will of the nation. And this is what has actually occurred. The conventions of the constitution now consist of customs which (whatever their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, through the elective House of Commons, of the nation. Our modern code of constitutional morality secures, though in a roundabout way what is called abroad the "sovereignty of the people."

That this is so becomes apparent if we examine into the effect of one or two among the leading articles of this code. The rule that the powers of the Crown must be exercised through Ministers who are members of one or other House of Parliament and who "command the confidence of the House of Commons," really means, that the elective portion of the legislature in effect, though by an indirect process, appoints the executive government; and, further, that the Crown, or the Ministry, must ultimately carry out, or at any rate not contravene, the wishes of the House of Commons. But as the process of representation is nothing else than a mode by which the will of the representative body or House of Commons is made to coincide with the will of the nation, it follows that a rule which gives the appointment and control of the government mainly to the House of Commons is at bottom a rule which gives the election and ultimate control of the executive to the nation. The same thing holds good of the under-

standing, or habit, in accordance with which the House of Lords are expected in every serious political controversy to give way at some point or other to the will of the House of Commons as expressing the deliberate resolve of the nation, or of that further custom which, though of comparatively recent growth, forms an essential article of modern constitutional ethics, by which, in case the Peers should finally refuse to acquiesce in the decision of the Lower House, the Crown is expected to nullify the resistance of the Lords by the creation of new Peerages.[1] How, it may be said, is the "point" to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its prerogative in the creation of new Peers? The question is worth raising, because the answer throws great light upon the nature and aim of the articles which make up our conventional code. This reply is, that the point at which the Lords must yield or the Crown intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the nation. The truth of this reply will hardly be questioned, but to admit that the deliberate decision of the electorate is decisive, is in fact to concede that the understandings as to the action of the House of Lords and of the Crown are, what we have found them to be, rules meant to ensure the ultimate supremacy of the true political sovereign, or, in other words, of the electoral body.[2]

[1] Mr. Hearn denies, as it seems to me on inadequate grounds, the existence of this rule or understanding. See Hearn, *Government of England* (2d ed.), p. 178.

[2] Compare Bagehot, *English Constitution*, pp. 25-27.

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Rules as to dissolution of Parliament.

By far the most striking example of the real sense attaching to a whole mass of constitutional conventions is found in a particular instance, which appears at first sight to present a marked exception to the general principles of constitutional morality. A Ministry placed in a minority by a vote of the Commons have, in accordance with received doctrines, a right to demand a dissolution of Parliament. On the other hand, there are certainly combinations of circumstances under which the Crown has a right to dismiss a Ministry who command a Parliamentary majority, and to dissolve the Parliament by which the Ministry are supported. The prerogative, in short, of dissolution may constitutionally be so employed as to override the will of the representative body, or, as it is popularly called, "The People's House of Parliament." This looks at first sight like saying that in certain cases the prerogative can be so used as to set at nought the will of the nation. But in reality it is far otherwise. The discretionary power of the Crown occasionally may be, and according to constitutional precedents sometimes ought to be, used to strip an existing House of Commons of its authority. But the reason why the House can in accordance with the constitution be deprived of power and of existence is that an occasion has arisen on which there is fair reason to suppose that the opinion of the House is not the opinion of the electors. A dissolution is in its essence an appeal from the legal to the political sovereign. A dissolution is allowable, or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation.

The dissolutions of 1784 and 1834.

This is the doctrine established by the celebrated contests of 1784 and of 1834. In each instance the King dismissed a Ministry which commanded the confidence of the House of Commons. In each case there was an appeal to the country by means of a dissolution. In 1784 the appeal resulted in a decisive verdict in favour of Pitt and his colleagues, who had been brought into office by the King against the will of the House of Commons. In 1834 the appeal led to a verdict equally decisive against Peel and Wellington, who also had been called to office by the Crown against the wishes of the House. The essential point to notice is that these contests each in effect admit the principle that it is the verdict of the political sovereign which ultimately determines the right or (what in politics is much the same thing) the power of a Cabinet to retain office, namely, the nation.

Much discussion, oratorical and literary, has been expended on the question whether the dissolution of 1784 or the dissolution of 1834 was constitutional.[1] To a certain extent the dispute is verbal, and depends upon the meaning of the word "constitutional." If we mean by it "legal," no human being can dispute that George the Third and his son could without any breach of law dissolve Parliament. If we mean "usual," no one can deny that each monarch took a very unusual step in dismissing a Ministry which commanded a majority in the House of Commons. If by "constitutional" we mean "in conformity with the fundamental principles of the constitution," we must without hesitation pronounce the conduct of George the Third constitutional, *i.e.* in conformity

[1] See Appendix, Note v., The Meaning of an Unconstitutional Law.

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with the principles of the constitution as they are now understood. He believed that the nation did not approve of the policy pursued by the House of Commons. He was right in this belief. No modern constitutionalist will dispute that the authority of the House of Commons is derived from its representing the will of the nation, and that the chief object of a dissolution is to ascertain that the will of Parliament coincides with the will of the nation. George the Third then made use of the prerogative of dissolution for the very purpose for which it exists. His conduct, therefore, on the modern theory of the constitution, was, as far as the dissolution went, in the strictest sense constitutional. But it is doubtful whether in 1784 the King's conduct was not in reality an innovation, though a salutary one, on the then prevailing doctrine. Any one who studies the questions connected with the name of John Wilkes, or the disputes between England and the American colonies, will see that George the Third and the great majority of George the Third's statesmen maintained up to 1784 a view of Parliamentary sovereignty which made Parliament in the strictest sense the sovereign power. To this theory Fox clung, both in his youth as a Tory and in his later life as a Whig. The greatness of Chatham and of his son lay in their perceiving that behind the Crown, behind the Revolution Families, behind Parliament itself, lay what Chatham calls the "great public," and what we should call the nation, and that on the will of the nation depended the authority of Parliament. In 1784 George the Third was led by the exigencies of the moment to adopt the attitude of Chatham and Pitt. He appealed (oddly

enough) from the sovereignty of Parliament, of which he had always been the ardent champion, to that sovereignty of the people, which he never ceased to hold in abhorrence. Whether this appeal be termed constitutional or revolutionary is now of little moment; it affirmed decisively the fundamental principle of our existing constitution that not Parliament but the nation is, politically speaking, the supreme power in the state. On this very ground the so-called "penal" dissolution was consistently enough denounced by Burke, who at all periods of his career was opposed to democratic innovation, and far less consistently by Fox, who blended in his political creed doctrines of absolute Parliamentary sovereignty with the essentially inconsistent dogma of the sovereignty of the people.

Of William the Fourth's action it is hard to speak with decision. The dissolution of 1834 was, from a constitutional point of view, a mistake; it was justified (if at all) by the King's belief that the House of Commons did not represent the will of the nation. The belief itself turned out erroneous, but the large minority obtained by Peel, and the rapid decline in the influence of the Whigs, proved that, though the King had formed a wrong estimate of public sentiment, he was not without reasonable ground for believing that Parliament had ceased to represent the opinion of the nation. Now if it be constitutionally right for the Crown to appeal from Parliament to the electors when the House of Commons has in reality ceased to represent its constituents, there is great difficulty in maintaining that a dissolution is unconstitutional simply because the electors do, when appealed to, support the opinions of their representa-

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tives. Admit that the electors are the political sovereign of the state, and the result appears naturally to follow, that an appeal to them by means of a dissolution is constitutional, whenever there is valid and reasonable ground for supposing that their Parliamentary representatives have ceased to represent their wishes. The constitutionality therefore of the dissolution in 1834 turns at bottom upon the still disputable question of fact, whether the King and his advisers had reasonable ground for supposing that the reformed House of Commons had lost the confidence of the nation. Whatever may be the answer given by historians to this inquiry, the precedents of 1784 and 1834 are decisive; they determine the principle on which the prerogative of dissolution ought to be exercised, and show that in modern times the rules as to the dissolution of Parliament are, like other conventions of the constitution, intended to secure the ultimate supremacy of the electorate as the true political sovereign of the state; that, in short, the validity of constitutional maxims is subordinate and subservient to the fundamental principle of popular sovereignty.

Relation of right of dissolution to Parliamentary sovereignty.

The necessity for dissolutions stands in close connection with the existence of Parliamentary sovereignty. Where, as in the United States, no legislative assembly is a sovereign power, the right of dissolution may be dispensed with; the constitution provides security that no change of vital importance can be effected without an appeal to the people; and the change in the character of a legislative body by the re-election of the whole or of part thereof at stated periods makes it certain that in the long run the sentiment of the legislature will harmonise with the feeling of the

public. Where Parliament is supreme, some further security for such harmony is necessary, and this security is given by the right of dissolution, which enables the Crown or the Ministry to appeal from the legislature to the nation. The security indeed is not absolutely complete. Crown, Cabinet, and Parliament may conceivably favour constitutional innovations which do not approve themselves to the electors. The Septennial Act could hardly have been passed in England, the Act of Union with Ireland would not, it is often asserted, have been passed by the Irish Parliament, if, in either instance, a legal revolution had been necessarily preceded by an appeal to the electorate. Here, as elsewhere, the constitutionalism of America proves of a more rigid type than the constitutionalism of England. Still, under the conditions of modern political life, the understandings which exist with us as to the right of dissolution afford nearly, if not quite, as much security for sympathy between the action of the legislature and the will of the people, as do the limitations placed on legislative power by the constitutions of American States. In this instance, as in others, the principles explicitly stated in the various constitutions of the States, and in the Federal Constitution itself, are impliedly involved in the working of English political institutions. The right of dissolution is the right of appeal to the people, and thus underlies all those constitutional conventions which, in one way or another, are intended to produce harmony between the legal and the political sovereign power.

CHAPTER XV

THE SANCTION BY WHICH THE CONVENTIONS OF THE CONSTITUTION ARE ENFORCED

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WHAT is the sanction by which obedience to the conventions of the constitution is at bottom enforced?

The problem to be solved.

This is by far the most perplexing of the speculative questions suggested by a study of constitutional law. Let us bear in mind the dictum of Paley, that it is often far harder to make men see the existence of a difficulty, than to make them, when once the difficulty is perceived, understand its explanation, and in the first place try to make clear to ourselves what is the precise nature of a puzzle of which most students dimly recognise the existence.

Constitutional understandings are admittedly not laws; they are not (that is to say) rules which will be enforced by the Courts. If a Premier were to retain office after a vote of censure passed by the House of Commons; if he were (as did Lord Palmerston under like circumstances) to dissolve, or strictly speaking to get the Crown to dissolve, Parliament, but, unlike Lord Palmerston, were to be again censured by the newly elected House of Commons, and then, after all this had taken place, were still to

remain at the head of the government,—no one could deny that such a Prime Minister had acted unconstitutionally. Yet no Court of Law would take notice of his conduct. Suppose, again, that on the passing by both Houses of an important bill, the Queen should refuse her assent to the measure, or (in popular language) put her "veto" on it. Here there would be a gross violation of usage, but the matter could not by any proceeding known to English law be brought before the judges. Take another instance. Suppose that Parliament were for more than a year not summoned for the despatch of business. This would be a course of proceeding of the most unconstitutional character. Yet there is no Court in the land before which one could go with the complaint that Parliament had not been assembled.[1] Still the conventional rules of the constitution, though not laws, are, as it is constantly asserted, nearly if not quite as binding as laws. They are, or appear to be, respected quite as much as most statutory enactments, and more than many. The puzzle is to see what is the force which habitually compels obedience to rules which have not behind them the coercive power of the Courts.

Partial answer, that constitutional understandings often disobeyed.

The difficulty of the problem before us cannot indeed be got rid of, but may be shifted and a good deal lessened, by observing that the invariable obedience which is assumed to be paid to constitutional understandings is itself more or less fictitious. The special articles of the conventional code are frequently

[1] See 4 Edward III. c. 14; 16 Car. II. c. 1; and 1 Will. and Mary, Sess. 2, c. 2. Compare these with the repealed 16 Car. I. c. 1, which would have made the assembling of Parliament a matter of law.

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disobeyed; a Minister sometimes refuses to retire when, as his opponents allege, he ought constitutionally to resign office. Not many years have passed since the Opposition of the day argued, if not convincingly yet with a good deal of plausibility, that the Ministry had violated a rule embodied in the Bill of Rights; in 1784 the House of Commons maintained, not only by argument but by repeated votes, that Pitt had deliberately defied more than one constitutional precept, and the Whigs of 1834 brought a like charge against Wellington and Peel. Nor is it doubtful that any one who searches through the pages of Hansard will find other instances in which constitutional maxims of long standing and high repute have been set at nought. The uncertain character of the deference paid to the conventions of the constitution is concealed under the current phraseology, which treats the successful violation of a constitutional rule as a proof that the maxim was not in reality part of the constitution. If a habit or precept which can be set at nought is thereby shown not to be a portion of constitutional morality, it naturally follows that no true constitutional rule is ever disobeyed.

But principle of conformity to will of the nation always obeyed.

Yet, though the obedience supposed to be rendered to the separate understandings or maxims of public life is to a certain extent fictitious, the assertion that they have nearly the force of law is not without meaning. Some few of the conventions of the constitution are rigorously obeyed. Parliament, for example, is summoned year by year with as much regularity as though its annual meeting were provided for by a law of nature; and (what is of more con-

sequence) though particular understandings are of uncertain obligation, neither the Crown nor any servant of the Crown ever refuses obedience to the grand principle which, as we have seen, underlies all the conventional precepts of the constitution, namely, that government must be carried on in accordance with the will of the House of Commons, and ultimately with the will of the nation as expressed through that House. This principle is not a law; it is not to be found in the statute-book, nor is it a maxim of common law; it will not be enforced by any ordinary judicial body. Why then has the principle itself, as also have certain conventions or understandings which are closely connected with it, the force of law? This, when the matter is reduced to its simplest form, is the puzzle with which we have to deal. It sorely needs a solution. Many writers, however, of authority, chiefly because they do not approach the constitution from its legal side, hardly recognise the full force of the difficulty which requires to be disposed of. They either pass it by, or else apparently acquiesce in one of two answers, each of which contains an element of truth, but neither of which fully removes the perplexities of any inquirer who is determined not to be put off with mere words.

Insufficient answers. Impeachment.

A reply more often suggested than formulated in so many words, is that obedience to the conventions of the constitution is ultimately enforced by the fear of impeachment.

If this view were tenable, these conventions, it should be remarked, would not be "understandings" at all, but "laws" in the truest sense of that term,

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and their sole peculiarity would lie in their being laws the breach of which could be punished only by one extraordinary tribunal, namely, the High Court o Parliament. But though it may well be conceded—and the fact is one of great importance—that th habit of obedience to the constitution was originall generated and confirmed by impeachments, yet ther are insuperable difficulties to entertaining the belie that the dread of the Tower and the block exerts an appreciable influence over the conduct of moder statesmen. No impeachment for violations of th constitution (since for the present purpose we ma leave out of account such proceedings as those take against Lord Macclesfield, Warren Hastings, and Lor Melville) has occurred for more than a century and half. The process, which is supposed to ensure Mr Gladstone's or Lord Salisbury's retiring from offic when placed in a hopeless minority, is obsolete. Th arm by which attacks on freedom were once repelle has grown rusty by disuse; it is laid aside among th antiquities of the constitution, nor will it ever, w may anticipate, be drawn again from its scabbard For, in truth, impeachment, as a means for enforcin the observance of constitutional morality, alway laboured under one grave defect. The possibility o its use suggested, if it did not stimulate, one mos important violation of political usage; a Minister wh dreaded impeachment would, since Parliament wa the only Court before which he could be impeached naturally advise the Crown not to convene Parliament There is something like a contradiction in terms i saying that a Minister is compelled to advise th meeting of Parliament by the dread of impeachmen

if Parliament should assemble. If the fear of Parliamentary punishment were the only difficulty in the way of violating the constitution, we may be sure that a bold party leader would, at the present day, as has been done in former centuries, sometimes suggest that Parliament should not meet.

Power of public opinion.

A second and current answer to the question under consideration is, that obedience to the conventional precepts of the constitution is ensured by the force of public opinion.

Now that this assertion is in one sense true, stands past dispute. The nation expects that Parliament shall be convened annually; the nation expects that a Minister who cannot retain the confidence of the House of Commons, shall give up his place, and no Premier even dreams of disappointing these expectations. The assertion, therefore, that public opinion gives validity to the received precepts for the conduct of public life is true. Its defect is that, if taken without further explanation, it amounts to little else than a re-statement of the very problem which it is meant to solve. For the question to be answered is, at bottom, Why is it that public opinion is, apparently at least, a sufficient sanction to compel obedience to the conventions of the constitution? and it is no answer to this inquiry to say that these conventions are enforced by public opinion. Let it also be noted that many rules of conduct which are fully supported by the opinion of the public are violated every day of the year. Public opinion enjoins the performance of promises and condemns the commission of crimes, but the settled conviction of the nation that promises ought to be kept does not hinder merchants from

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going into the *Gazette*, nor does the universal execration of the villain who sheds man's blood prevent the commission of murders. That public opinion does to a certain extent check extravagance and criminality is of course true, but the operation of opinion is in this case assisted by the law, or in the last resort by the physical power at the disposal of the state. The limited effect of public opinion when aided by the police hardly explains the immense effect of opinion in enforcing rules which may be violated without any risk of the offender being brought before the Courts To contend that the understandings of the constitution derive their coercive power solely from the approval of the public, is very like maintaining the kindred doctrine that the conventions of international law are kept alive solely by moral force Every one, except a few dreamers, perceives that the respect paid to international morality is due in great measure, not to moral force, but to the physical force in the shape of armies and navies, by which the commands of general opinion are in many cases supported and it is difficult not to suspect that, in England at least, the conventions of the constitution are supported and enforced by something beyond or in addition to the public approval.

True answer,—Obedience to conventions enforced by power of law.

What then is this "something"? My answer is that it is nothing else than the force of the law. The dread of impeachment may have established, and public opinion certainly adds influence to, the prevailing dogmas of political ethics. But the sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are

expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the Courts and the law of the land.

This is the true answer to the inquiry which I have raised, but it is an answer which undoubtedly requires both explanation and defence.

Explanation.

The meaning of the statement that the received precepts of the constitution are supported by the law of the land, and the grounds on which that statement is based, can be most easily made apparent by considering what would be the legal results which would inevitably ensue from the violation of some indisputable constitutional maxim.

Yearly meeting of Parliament.

No rule is better established than that Parliament must assemble at least once a year. This maxim, as before pointed out, is certainly not derived from the common law, and is not based upon any statutory enactment. Now suppose that Parliament were prorogued once and again for more than a year, so that for two years no Parliament sat at Westminster. Here we have a distinct breach of a constitutional practice or understanding, but we have no violation of law. What, however, would be the consequences which would ensue? They would be, speaking generally, that any Ministry who at the present day sanctioned or tolerated this violation of the constitution, and every person connected with the government, would immediately come into conflict with the law of the land.

A moment's reflection shows that this would be so.

The Mutiny Act would in the first place expire, but on the expiration of the Mutiny Act all means of

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controlling the army without a breach of law would cease. Either the army must be discharged, in which case the means of maintaining law and order would come to an end, or the army must be kept up and discipline must be maintained without legal authority for its maintenance. If this alternative were adopted, every person, from the Commander-in-Chief downwards, who took part in the control of the army, and indeed every soldier who carried out the commands of his superiors, would find that not a day passed without his committing or sanctioning acts which would render him liable to stand as a criminal in the dock. Then, again, though most of the taxes would still come into the Exchequer, large portions of the revenue would cease to be legally due and could not be legally collected, whilst every official, who acted as collector, would expose himself to actions or prosecutions. The part, moreover, of the revenue which came in, could not be legally applied to the purposes of the government. If the Ministry laid hold of the revenue they would find it difficult to avoid breaches of definite laws which would expose them to appear before the Courts. Suppose however that the Cabinet were willing to defy the law. Their criminal daring would not suffice for its purpose; they could not get hold of the revenue without the connivance or aid of a large number of persons, some of them indeed officials, but some of them such as the Comptroller-General, the Governors of the Bank of England, and the like, unconnected with the administration. None of them, it should be noted, could receive from the government or the Crown any protection against legal liability, and any of them the moment he

employed force would be exposed to resistance supported by the Courts. For the law (it should always be borne in mind) operates in two different ways. It inflicts penalties and punishment upon law-breakers, and (what is of equal consequence) it enables law-respecting citizens to refuse obedience to illegal commands. It legalises passive resistance. The efficacy of such legal opposition is immensely increased by the non-existence in England of anything resembling the *droit administratif* of France,[1] or of that wide discretionary authority which is possessed by every continental government. The result is, that an administration which attempted to dispense with the annual meeting of Parliament could not ensure the obedience even of its own officials, and, unless prepared distinctly to violate the undoubted law of the land, would find itself not only opposed but helpless.

The rule, therefore, that Parliament must meet once a year, though in strictness a constitutional convention which is not a law and will not be enforced by the Courts, turns out nevertheless to be an understanding which cannot be neglected without involving hundreds of persons, many of whom are by no means specially amenable to government influence, in distinct acts of illegality cognisable by the tribunals of the country. This convention therefore of the constitution is in reality based upon, and secured by, the law of the land.

This no doubt is a particularly plain case. I have examined it fully, both because it is a particularly plain instance, and because the full understanding of it affords the clue which guides us to the principle on

[1] See chap. xii. *ante*.

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which really rests such coercive force as is possessed by the conventions of the constitution.

Resignation of Ministry which has lost confidence of the House of Commons.

To see that this is so let us consider for a moment the effect of disobedience by the government to one of the most purely conventional among the maxims of constitutional morality,—the rule, that is to say, that a Ministry ought to retire on a vote that they no longer possess the confidence of the House of Commons. Suppose that a Ministry, after the passing of such a vote, were to act in 1889 as Pitt acted in 1783, and hold office in the face of the censure passed by the House. There would clearly be a *primâ facie* breach of constitutional ethics. What must ensue is clear. If the Ministry wished to keep within the constitution they would announce their intention of appealing to the constituencies, and the House would probably assist in hurrying on a dissolution. All breach of law would be avoided, but the reason of this would be that the conduct of the Cabinet would not be a breach of constitutional morality; for the true rule of the constitution admittedly is, not that a Ministry cannot keep office when censured by the House of Commons, but that under such circumstances a Ministry ought not to remain in office unless they can by an appeal to the country obtain the election of a House which will support the government. Suppose then that, under the circumstances I have imagined, the Ministry either would not recommend a dissolution of Parliament, or, having dissolved Parliament and being again censured by the newly elected House of Commons, would not resign office. It would, under this state of things, be as clear as day that the understandings of the consti-

tution had been violated. It is however equally clear that the House would have in their own hands the means of ultimately forcing the Ministry either to respect the constitution or to violate the law. Sooner or later the moment would come for passing the Mutiny Act or the Appropriation Act, and the House by refusing to pass either of these enactments would involve the Ministry in all the inextricable embarrassments which (as I have already pointed out) immediately follow upon the omission to convene Parliament for more than a year. The breach, therefore, of a purely conventional rule, of a maxim utterly unknown and indeed opposed to the theory of English law, ultimately entails upon those who break it direct conflict with the undoubted law of the land. We have then a right to assert that the force which in the last resort compels obedience to constitutional morality is nothing else than the power of the law itself. The conventions of the constitution are not laws, but, in so far as they really possess binding force, derive their sanction from the fact that whoever breaks them must finally break the law and incur the penalties of a law-breaker.

Objections.

It is worth while to consider one or two objections which may be urged with more or less plausibility against the doctrine that the obligatory force of constitutional morality is derived from the law itself.

Law may be overpowered by force.

The government, it is sometimes suggested, may by the use of actual force carry through a *coup d'état* and defy the law of the land.

This suggestion is true, but is quite irrelevant. No constitution can be absolutely safe from revolution or from a *coup d'état;* but to show that the laws may

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be defied by violence does not touch or invalidate the statement that the understandings of the constitution are based upon the law. They have certainly no more force than the law itself. A Minister who, like the French President in 1851, could override the law could of course overthrow the constitution. The theory propounded aims only at proving that when constitutional understandings have nearly the force of law they derive their power from the fact that they cannot be broken without a breach of law. No one is concerned to show, what indeed never can be shown, that the law can never be defied, or the constitution never be overthrown.

It should further be observed that the admitted sovereignty of Parliament tends to prevent violent attacks on the constitution. Revolutionists or conspirators generally believe themselves to be supported by the majority of the nation, and, when they succeed, this belief is in general well founded. But in modern England, a party, however violent, who count on the sympathy of the people, can accomplish by obtaining a Parliamentary majority all that could be gained by the success of a revolution. When a spirit of reaction or of innovation prevails throughout the country, a reactionary or revolutionary policy is enforced by Parliament without any party needing to make use of violence. The oppressive legislation of the Restoration in the seventeenth century, and the anti-revolutionary legislation of the Tories from the outbreak of the Revolution till the end of George the Third's reign, saved the constitution from attack. A change of spirit averted a change of form; the flexibility of the constitution proved its strength.

Parliament has never refused to pass Mutiny Act.

If the maintenance of political morality, it may with some plausibility be asked, really depends on the right of Parliament to refuse to pass laws such as the annual Mutiny Act, which are necessary for the maintenance of order, and indeed for the very existence of society, how does it happen that no English Parliament has ever employed this extreme method of enforcing obedience to the constitution?

The true answer to the objection thus raised appears to be that the observance of the main and the most essential of all constitutional rules, the rule, that is to say, requiring the annual meeting of Parliament, is ensured, without any necessity for Parliamentary action, by the temporary character of the Mutiny Act, and that the power of Parliament to compel obedience to its wishes by refusing to pass the Act is so complete that the mere existence of the power has made its use unnecessary. In matter of fact, no Ministry has since the Revolution of 1689 ever defied the House of Commons, unless the Cabinet could confide in the support of the country, or, in other words, could count on the election of a House which would support the policy of the government. To this we must add, that in the rare instances in which a Minister has defied the House, the refusal to pass the Mutiny Act has been threatened or contemplated. Pitt's victory over the Coalition is constantly cited as a proof that Parliament cannot refuse to grant supplies or to pass an Act necessary for the discipline of the army. Yet any one who studies with care the great "Case of the Coalition" will see that it does not support the dogma for which it is quoted. Fox and his friends did threaten and did intend to press to the very

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utmost all the legal powers of the House of Commons. They failed to carry out their intention solely because they at last perceived that the majority of the House did not represent the will of the country. What the "leading case" shows is, that the Cabinet, when supported by the Crown, and therefore possessing the power of dissolution, can defy the will of a House of Commons if the House is not supported by the electors. Here we come round to the fundamental dogma of modern constitutionalism; the legal sovereignty of Parliament is subordinate to the political sovereignty of the nation. This is the conclusion in reality established by the events of 1784. Pitt overrode the customs, because he adhered to the principles, of the constitution. He broke through the received constitutional understandings without damage to his power or reputation; he might in all probability have in case of necessity broken the law itself with impunity. For had the Coalition pressed their legal rights to an extreme length, the new Parliament of 1784 would in all likelihood have passed an Act of Indemnity for illegalities necessitated, or excused, by the attempt of an unpopular faction to drive from power a Minister supported by the Crown, by the Peers, and by the nation. However this may be, the celebrated conflict between Pitt and Fox lends no countenance to the idea that a House of Commons supported by the country would not enforce the morality of the constitution by placing before any Minister who defied its precepts the alternative of resignation or revolution.[1]

[1] It is further not the case that the idea of refusing supplies is unknown to modern statesmen. In 1868 such refusal was threatened in

Chapter XV.

Subordinate inquiries.

A clear perception of the true relation between the conventions of the constitution and the law of the land supplies an answer to more than one subordinate question which has perplexed students and commentators.

Why has impeachment gone out of use?

How is it that the ancient methods of enforcing Parliamentary authority, such as impeachment, the formal refusal of supplies, and the like, have fallen into disuse?

The answer is, that they are disused because ultimate obedience to the underlying principle of all modern constitutionalism, which is nothing else than the principle of obedience to the will of the nation as expressed through Parliament, is so closely bound up with the law of the land that it can hardly be violated without a breach of the ordinary law. Hence the extraordinary remedies, which were once necessary for enforcing the deliberate will of the nation, having become unnecessary, have fallen into desuetude. If they are not altogether abolished, the cause lies partly in the conservatism of the English people, and partly in the valid consideration that crimes may still be occasionally committed for which the ordinary law of the land hardly affords due punishment, and which therefore may well be dealt with by the High Court of Parliament.

Why are constitutional understandings variable?

Why is it that the understandings of the constitution have about them a singular element of vagueness and variability?

Why is it, to take definite instances of this uncer-

order to force an early dissolution of Parliament; in 1886 the dissolution took place before the supplies were fully granted, and the supplies granted were granted for only a limited period.

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tainty and changeableness, that no one can define with absolute precision the circumstances under which a Prime Minister ought to retire from office? Why is it that no one can fix the exact point at which resistance of the House of Lords to the will of the House of Commons becomes unconstitutional? and how does it happen that the Peers could at one time arrest legislation in a way which now would be generally held to involve a distinct breach of constitutional morality? What is the reason why no one can describe with precision the limits to the influence on the conduct of public affairs which may rightly be exerted by the reigning monarch? and how does it happen that George the Third and even George the Fourth each made his personal will or caprice tell on the policy of the nation in a very different way and degree from that in which Queen Victoria has ever attempted to exercise personal influence over matters of state?

The answer in general terms to these and the like inquiries is, that the one essential principle of the constitution is obedience by all persons to the deliberately expressed will of the House of Commons in the first instance, and ultimately to the will of the nation as expressed through Parliament. The conventional code of political morality is, as already pointed out, merely a body of maxims meant to secure respect for this principle. Of these maxims some indeed—such, for example, as the rule that Parliament must be convoked at least once a year—are so closely connected with the respect due to Parliamentary or national authority, that they will never be neglected by any one who is not prepared to play the part of a revolutionist; such rules have received the undoubted stamp

of national approval, and their observance is secured by the fact that whoever breaks or aids in breaking them will almost immediately find himself involved in a breach of law. Other constitutional maxims stand in a very different position. Their maintenance up to a certain point tends to secure the supremacy of Parliament, but they are themselves vague, and no one can say to what extent the will of Parliament or the nation requires their rigid observance; they therefore obtain only a varying and indefinite amount of obedience.

Withdrawal of confidence by House of Commons.

Thus the rule that a Ministry who have lost the confidence of the House of Commons should retire from office is plain enough, and any permanent neglect of the spirit of this rule would be absolutely inconsistent with Parliamentary government, and would finally involve the Minister who broke the rule in acts of undoubted illegality. But when you come to inquire what are the signs by which you are to know that the House has withdrawn its confidence from a Ministry,—whether, for example, the defeat of an important Ministerial measure or the smallness of a Ministerial majority are a certain proof that a Ministry ought to retire,—you ask a question which admits of no absolute reply.[1] All that can be said is, that a Cabinet ought not to continue in power (subject of course to the one exception on which I have before dwelt[2]) after the expression by the House of Commons of a wish for the Cabinet's retirement. Of course therefore a Minister or a Ministry must

[1] See Hearn, *Government of England*, chap. ix., for an attempt to determine the circumstances under which a Ministry ought or ought not to keep office.

[2] See pp. 356-360, *ante*.

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resign if the House passes a vote of want of confidence. But there are a hundred signs of Parliamentary disapproval which, according to circumstances, either may or may not be a sufficient notice that a Minister ought to give up office. The essential thing is that the Ministry should obey the House as representing the nation. But the question whether the House of Commons has or has not indirectly intimated its will that a Cabinet should give up office is not a matter as to which any definite principle can be laid down. The difficulty which now exists, in settling the point at which a Premier and his colleagues are bound to hold that they have lost the confidence of the House, is exactly analogous to the difficulty which often perplexed statesmen of the last century, of determining the point at which a Minister was bound to hold he had lost the then essential confidence of the King. The ridiculous efforts of the Duke of Newcastle to remain at the head of the Treasury, in spite of the broadest hints from Lord Bute that the time had come for resignation, are exactly analogous to the undignified persistency with which later Cabinets have occasionally clung to office in the face of intimations that the House desired a change of government. As long as a master does not directly dismiss a servant, the question whether the employer's conduct betrays a wish that the servant should give notice must be an inquiry giving rise to doubt and discussion. And if there be sometimes a difficulty in determining what is the will of Parliament, it must often of necessity be still more difficult to determine what is the will of the nation, or, in other words, of the majority of the electors.

When House of Lords should give way to Commons.

The general rule that the House of Lords must in matters of legislation ultimately give way to the House of Commons is one of the best established maxims of modern constitutional ethics. But if any inquirer asks how the point at which the Peers are to give way is to be determined, no answer which even approximates to the truth can be given, except the very vague reply that the Upper House must give way whenever it is clearly proved that the will of the House of Commons represents the deliberate will of the nation. The nature of the proof differs under different circumstances.

When once the true state of the case is perceived, it is easy to understand a matter which, on any cut and dried theory of the constitution, can only with difficulty be explained, namely, the relation occupied by modern Cabinets towards the House of Lords. It is certain that for more than half a century Ministries have constantly existed which did not command the confidence of the Upper House, and that such Ministries have, without meeting much opposition on the part of the Peers, in the main carried out a policy of which the Peers did not approve. It is also certain that while the Peers have been forced to pass many bills which they disliked, they have often exercised large though very varying control over the course of legislation. Between 1834 and 1840 the Upper House, under the guidance of Lord Lyndhurst, repeatedly and with success opposed Ministerial measures which had passed the House of Commons. For many years Jews were kept out of Parliament simply because the Lords were not prepared to admit them. If you search for the real cause of this state of things,

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you will find that it was nothing else than the fact, constantly concealed under the misleading rhetoric of party warfare, that on the matters in question the electors were not prepared to support the Cabinet in taking the steps necessary to compel the submission of the House of Lords. On any matter upon which the electors are firmly resolved, a Premier, who is in effect the representative of the House of Commons, has the means of coercion, namely, by the creation of Peers. In a country indeed like England, things are rarely carried to this extreme length. The knowledge that a power can be exercised constantly prevents its being actually put in force. This is so even in private life; most men pay their debts without being driven into Court, but it were absurd to suppose that the possible compulsion of the Courts and the sheriff has not a good deal to do with regularity in the payment of debts. The acquiescence of the Peers in measures which the Peers do not approve arises at bottom from the fact that the nation, under the present constitution, possesses the power of enforcing, through very cumbersome machinery, the submission of the Peers to the conventional rule that the wishes of the House of Lords must finally give way to the decisions of the House of Commons. But the rule itself is vague, and the degree of obedience which it obtains is varying, because the will of the nation is often not clearly expressed, and further, in this as in other matters, is itself liable to variation. If the smoothness with which the constitutional arrangements of modern England work should, as it often does, conceal from us the force by which the machinery of the constitution is kept working, we may with advantage consult

the experience of English colonies. No better example can be given of the methods by which a Representative Chamber attempts in the last resort to compel the obedience of an Upper House than is afforded by the varying phases of the conflict which raged in Victoria during 1878 and 1879 between the two Houses of the Legislature. There the Lower House attempted to enforce upon the Council the passing of measures which the Upper House did not approve, by, in effect, inserting the substance of a rejected bill in the Appropriation Bill. The Council in turn threw out the Appropriation Bill. The Ministry thereupon dismissed officials, magistrates, county court judges, and others, whom they had no longer the means to pay, and attempted to obtain payments out of the Treasury on the strength of resolutions passed solely by the Lower House. At this point however the Ministry came into conflict with an Act of Parliament, that is, with the law of the land. The contest continued under different forms until a change in public opinion finally led to the election of a Lower House which could act with the Council. With the result of the contest we are not concerned. Three points however should be noticed. The conflict was ultimately terminated in accordance with the expressed will of the electors; each party during its course put in force constitutional powers hardly ever in practice exerted in England; as the Council was elective, the Ministry did not possess any means of producing harmony between the two Houses by increasing the number of the Upper House. It is certain that if the Governor could have nominated members of the Council, the Upper House would have yielded to the will of the

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Lower, in the same way in which the Peers always in the last resort bow to the will of the House of Commons.

Why is the personal influence of the Crown uncertain?

How is it, again, that all the understandings which are supposed to regulate the personal relation of the Crown to the actual work of government are marked by the utmost vagueness and uncertainty?

The matter is, to a certain extent at any rate, explained by the same train of thought as that which we have followed out in regard to the relation between the House of Lords and the Ministry. The revelations of political memoirs and the observation of modern public life make quite clear two points, both of which are curiously concealed under the mass of antiquated formulas which hide from view the real working of our institutions. The first is, that while every act of state is done in the name of the Crown, the real executive government of England is the Cabinet. The second is, that though the Crown has no real concern in a vast number of the transactions which take place under the Royal name, no one of Queen Victoria's predecessors, nor, it may be presumed, the Queen herself, has ever acted upon or affected to act upon the maxim originated by Thiers, that "the King reigns but does not govern." George the Third took a leading part in the work of administration; his two sons, each in different degrees and in different ways, made their personal will and predilections tell on the government of the country. No one really supposes that there is not a sphere, though a vaguely defined sphere, in which the personal will of the Queen has under the constitution very considerable influence. The strangeness

of this state of things is, or rather would be to any one who had not been accustomed from his youth to the mystery and formalism of English constitutionalism, that the rules or customs which regulate the personal action of the Crown are utterly vague and undefined. The reason of this will however be obvious to any one who has followed these chapters. The personal influence of the Crown exists, not because acts of state are done formally in the Crown's name, but because neither the legal sovereign power, namely, Parliament, nor the political sovereign, namely, the nation, wishes that the reigning monarch should be without personal weight in the government of the country. The customs or understandings which regulate or control the exercise of the Queen's personal influence are vague and indefinite, both because statesmen feel that the matter is one hardly to be dealt with by precise rules, and because no human being knows how far and to what extent the nation wishes that the voice of the reigning monarch should command attention. All that can be asserted with certainty is, that on this matter the practice of the Crown and the wishes of the nation have from time to time varied. George the Third made no use of the so-called veto which had been used by William the Third; but he more than once insisted upon his will being obeyed in matters of the highest importance. None of his successors have after the manner of George the Third made their personal will decisive as to general measures of policy. In small things as much as in great one can discern a tendency to transfer to the Cabinet powers once actually exercised by the King. The scene between Jeanie Deans and Queen Caroline

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is a true picture of a scene which might have taken place under George the Second; George the Third's firmness secured the execution of Dr. Dodd. At the present day the right of pardon belongs in fact to the Home Secretary. A modern Jeanie Deans would be referred to the Home Office; the question whether a popular preacher should pay the penalty of his crimes would now, with no great advantage to the country, be answered by the Cabinet.

The effect of surviving prerogatives of Crown.

What, again, is the real effect produced by the survival of prerogative powers?

Here we must distinguish two different things, namely, the way in which the existence of the prerogative affects the personal influence of the Queen, and the way in which it affects the power of the executive government.

The fact that all important acts of state are done in the name of the Queen and in most cases with the cognisance of the Queen, and that many of these acts, such, for example, as the appointment of judges or the creation of bishops, or the conduct of negotiations with foreign powers and the like, are exempt from the direct control or supervision of Parliament, gives the reigning monarch an opportunity for exercising great influence on the conduct of affairs; and Bagehot has marked out, with his usual subtlety, the mode in which the mere necessity under which Ministers are placed of consulting with and giving information to the Queen secures a wide sphere for the exercise of the legitimate influence of a constitutional ruler.

But though it were a great error to underrate the extent to which the formal authority of the Crown

confers real power upon the Queen, the far more important matter is to notice the way in which the survival of the prerogative affects the position of the Cabinet. It leaves in the hands of the Premier and his colleagues, large powers which can be exercised, and constantly are exercised, free from Parliamentary control. This is especially the case in all foreign affairs. Parliament may censure a Ministry for misconduct in regard to the foreign policy of the country. But a treaty made by the Crown, or in fact by the Cabinet, is valid without the authority or sanction of Parliament; and it is even open to question whether the treaty-making power of the executive might not in some cases override the law of the land.[1] However this may be, it is not Parliament, but the Ministry, who direct the diplomacy of the nation, and virtually decide all questions of peace or war. The founders of the American Union showed their full appreciation of the latitude left to the executive government under the English constitution by one of the most remarkable of their innovations upon it. They lodged the treaty-making power in the hands, not of the President, but of the President and the Senate; and further gave to the Senate a right of veto on Presidential appointments to office. These arrangements supply a valuable illustration of the way in which restrictions on the prerogative become restrictions on the discretionary authority of the executive. Were the House of Lords to have conferred upon it by statute the rights of the Senate, the change in our institutions would be described with technical correctness as the limitation of the

[1] See the *Parlement Belge*, 4 P. D. 129; 5 P. D. (C. A.), 197.

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prerogative of the Crown as regards the making of treaties and of official appointments. But the true effect of the constitutional innovation would be to place a legal check on the discretionary powers of the Cabinet.

The survival of the prerogative, conferring as it does wide discretionary authority upon the Cabinet, involves a consequence which constantly escapes attention. It immensely increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the state. When the King was the chief member of the sovereign body, Ministers were in fact no less than in name the King's servants. At periods of our history when the Peers were the most influential body in the country, the conduct of the Ministry represented with more or less fidelity the wishes of the Peerage. Now that the House of Commons has become by far the most important part of the sovereign body, the Ministry in all matters of discretion carry out, or tend to carry out, the will of the House. When however the Cabinet cannot act except by means of legislation, other considerations come into play. A law requires the sanction of the House of Lords. No government can increase its statutory authority without obtaining the sanction of the Upper Chamber. Thus an Act of Parliament when passed represents, not the absolute wishes of the House of Commons, but these wishes as modified by the influence of the House of Lords. The Peers no doubt will in the long run conform to the wishes of the

electorate. But the Peers may think that the electors will disapprove of, or at any rate be indifferent to, a bill which meets with the approval of the House of Commons. Hence while every action of the Cabinet which is done in virtue of the prerogative is in fact though not in name under the direct control of the representative chamber, all powers which can be exercised only in virtue of a statute are more or less controlled in their creation by the will of the House of Lords; they are further controlled in their exercise by the interference of the Courts. One example, taken from the history of recent years, illustrates the practical effect of this difference.[1] In 1872 the Ministry of the day carried a bill through the House of Commons abolishing the system of purchase in the army. The bill was rejected by the Lords: the Cabinet then discovered that purchase could be abolished by Royal warrant, *i.e.* by something very like the exercise of the prerogative.[2] The system was then and there abolished. The change, it will probably be conceded, met with the approval, not only of the Commons, but of the electors. But it will equally be conceded that had the alteration required statutory authority the system of purchase might have continued in force up to the present day. The existence of the prerogative enabled the Ministry in this particular instance to give immediate effect to the wishes of the electors, and this is the result which,

[1] On this subject there are remarks worth noting in Stephen's *Life of Fawcett*, pp. 271, 272.

[2] Purchase was not abolished by the prerogative in the ordinary legal sense of the term. A statute prohibited the sale of offices except in so far as might be authorised in the case of the army by royal warrant. When therefore the warrant authorising the sale was cancelled the statute took effect.

Part III. under the circumstances of modern politics, the survival of the prerogative will in every instance produce. The prerogatives of the Crown have become the privileges of the people, and any one who wants to see how widely these privileges may conceivably be stretched as the House of Commons becomes more and more the direct representative of the true sovereign, should weigh well the words in which Bagehot describes the powers which can still legally be exercised by the Crown without consulting Parliament; and should remember that these powers can now be exercised by a Cabinet who are really servants, not of the Crown, but of a representative chamber which in its turn obeys the behests of the electors.

"I said in this book that it would very much sur-
" prise people if they were only told how many things
" the Queen could do without consulting Parliament,
" and it certainly has so proved, for when the Queen
" abolished purchase in the army by an act of pre-
" rogative (after the Lords had rejected the bill for
" doing so), there was a great and general astonish-
" ment.

"But this is nothing to what the Queen can by law
" do without consulting Parliament. Not to mention
" other things, she could disband the army (by law
" she cannot engage more than a certain number of
" men, but she is not obliged to engage any men);
" she could dismiss all the officers, from the General
" commanding-in-chief downwards; she could dis-
" miss all the sailors too; she could sell off all our
" ships-of-war and all our naval stores; she could
" make a peace by the sacrifice of Cornwall, and begin
" a war for the conquest of Brittany. She could make

"every citizen in the United Kingdom, male or "female, a peer; she could make every parish in "the United Kingdom a 'university'; she could "dismiss most of the civil servants; she could pardon "all offenders. In a word, the Queen could by "prerogative upset all the action of civil govern- "ment within the government, could disgrace the "nation by a bad war or peace, and could, by dis- "banding our forces, whether land or sea, leave us "defenceless against foreign nations."[1]

If government by Parliament is ever transformed into government by the House of Commons, the transformation will, it may be conjectured, be effected by use of the prerogatives of the Crown.

Conclusion.

Let us cast back a glance for a moment at the results which we have obtained by surveying the English constitution from its legal side.

The constitution when thus looked at ceases to appear a "sort of maze;" it is seen to consist of two different parts; the one part is made up of understandings, customs, or conventions which, not being enforced by the Courts, are in no true sense of the word laws; the other part is made up of rules which are enforced by the Courts, and which, whether embodied in statutes or not, are laws in the strictest sense of the term, and make up the true law of the constitution.

This law of the constitution is, we have further found, in spite of all appearances to the contrary, the true foundation on which the English polity rests, and it gives in truth even to the conventional

[1] Bagehot, *English Constitution*, Introd. pp. xxxv. and xxxvi.

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element of constitutional law such force as it really possesses.[1]

The law of the constitution, again, is in all its branches the result of two guiding principles, which have been gradually worked out by the more or less conscious efforts of generations of English statesmen and lawyers.

The first of these principles is the sovereignty of Parliament, which means in effect the gradual transfer of power from the Crown to a body which has come more and more to represent the nation.[2] This curious process, by which the personal authority of the King

[1] See pp. 362-376, *ante*.

[2] A few words may be in place as to the method by which this transfer was accomplished. The leaders of the English people in their contests with royal power never attempted, except in periods of revolutionary violence, to destroy or dissipate the authority of the Crown as head of the state. Their policy, continued through centuries, was to leave the power of the King untouched, but to bind down the action of the Crown to recognised modes of procedure which, if observed, would secure first the supremacy of the law, and ultimately the sovereignty of the nation. The King was acknowledged to be supreme judge, but it was early established that he could act judicially only in and through his Courts; the King was recognised as the only legislator, but he could enact no valid law except as King in Parliament; the King held in his hands all the prerogatives of the executive government, but, as was after long struggles determined, he could legally exercise these prerogatives only through Ministers who were members of his Council, and incurred responsibility for his acts. Thus the personal will of the King was gradually identified with and transformed into the lawful and legally expressed will of the Crown. This transformation was based upon the constant use of fictions. It bears on its face that it was the invention of lawyers. If proof of this were wanted, we should find it in the fact that the "Parliaments" of France towards the end of the eighteenth century tried to use against the fully developed despotism of the French monarchy, fictions recalling the arts by which, at a far earlier period, English constitutionalists had nominally checked the encroachments while really diminishing the sphere, of the royal prerogative. Legal statesmanship bears everywhere the same character. See Rocquain, *L'Esprit Révolutionnaire avant la Révolution*.

has been turned into the sovereignty of the King in Parliament, has had two effects: it has put an end to the arbitrary powers of the monarch; it has preserved intact and undiminished the supreme authority of the state.

The second of these principles is what I have called the "rule of law," or the supremacy throughout all our institutions of the ordinary law of the land. This rule of law, which means at bottom the right of the Courts to punish any illegal act by whomsoever committed, is of the very essence of English institutions. If the sovereignty of Parliament gives the form, the supremacy of the law of the land determines the substance of our constitution. The English constitution in short, which appears when looked at from one point of view to be a mere collection of practices or customs, turns out, when examined in its legal aspect, to be more truly than any other polity in the world, except the Constitution of the United States,[1] based on the law of the land.

When we see what are the principles which truly underlie the English polity, we also perceive how rarely they have been followed by statesmen who more or less intended to copy the constitution of England. The sovereignty of Parliament is an idea fundamentally inconsistent with the notions which govern the inflexible or rigid constitutions existing in

[1] It is well worth notice that the Constitution of the United States, as it actually exists, rests to a very considerable extent on judge-made law. Chief-Justice Marshall, as the "Expounder of the Constitution," may almost be reckoned among the builders if not the founders of the American polity. See for a collection of his judgments on constitutional questions, *The Writings of John Marshall, late Chief-Justice of the United States, on the Federal Constitution.*

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by far the most important of the countries which have adopted any scheme of representative government. The "rule of law" is a conception which in the United States indeed has received a development beyond that which it has reached in England; but it is an idea not so much unknown to as deliberately rejected by the constitution-makers of France, and of other continental countries which have followed French guidance. For the supremacy of the law of the land means in the last resort the right of the judges to control the executive government, whilst the *séparation des pouvoirs* means, as construed by Frenchmen, the right of the government to control the judges. The authority of the Courts of Law as understood in England can therefore hardly co-exist with the system of *droit administratif* as it prevails in France. We may perhaps even go so far as to say that English legalism is hardly consistent with the existence of an official body which bears any true resemblance to what foreigners call "the administration." To say this is not to assert that foreign forms of government are necessarily inferior to the English constitution, or unsuited for a civilised and free people. All that necessarily results from an analysis of our institutions, and a comparison of them with the institutions of foreign countries, is, that the English constitution is still marked, far more deeply than is generally supposed, by peculiar features, and that these peculiar characteristics may be summed up in the combination of Parliamentary Sovereignty with the Rule of Law.

APPENDIX

NOTE I

RIGIDITY OF FRENCH CONSTITUTIONS

TWELVE constitutions[1] have been framed by French constitution-makers since the meeting of the States General in 1789.

A survey of the provisions (if any) contained in these Constitutions for the revision thereof leads to some interesting results.

First. With but two exceptions, every French Constitution has been marked by the characteristic of "rigidity." Frenchmen of all political schools have therefore agreed in the assumption, that the political foundations of the State must be placed beyond the reach of the ordinary legislature, and ought to be changed, if at all, only with considerable difficulty, and generally after such delay as may give the nation time for maturely reflecting over any proposed innovation.

In this respect the Monarchical Constitution of 1791 is noteworthy. That Constitution formed a legislature consisting of one Assembly, but did not give this Assembly or Parliament any authority to revise the Constitution. The only body endowed with such authority was an Assembly of Revision (*Assemblée de Révision*), and the utmost pains were taken to hamper the con-

[1] Viz. (1) The Monarchical Constitution of 1792; (2) the Republican Constitution of 1793; (3) the Republican Constitution of 1795 (Directory), 5 Fruct. An. III.; (4) the Consular Constitution of the Year VIII. (1799); (5) the Imperial Constitution, 1804; (6) the Provisional Constitution, 1814; (7) the Constitutional Charter, 1814 (Restoration); (8) the Additional Act (*Acte Additionnel*), 1815, remodelling the Imperial Constitution; (9) the Constitutional Charter of 1830 (Louis Philippe); (10) the Republic of 1848; (11) the Second Imperial Constitution, 1852; (12) the present Republic, 1870-75. See Hélie, *Les Constitutions de la France*, and Plouard, *Les Constitutions Françaises*.

It is possible either to lengthen or to shorten the list of French Constitutions according to the view which the person forming the list takes of the extent of the change in the arrangements of a state necessary to form a new Constitution.

vening and to limit the action of the Assembly of Revision. The provisions enacted with this object were in substance as follows:—An ordinary Legislative Assembly was elected for two years. No change in the Constitution could take place until three successive Legislative Assemblies should have expressed their wish for a change in some article of the Constitution. On a resolution in favour of such reform having been carried in three successive legislatures or Parliaments, the ensuing Legislative Assembly was to be increased by the addition of 249 members, and this increased Legislature was to constitute an Assembly of Revision.

This Assembly of Revision was tied down, as far as the end could be achieved by the words of the Constitution, to debate on those matters only which were submitted to the consideration of the Assembly by the resolution of the three preceding legislatures. The authority, therefore, of the Assembly was restricted to a partial revision of the Constitution. The moment this revision was finished the 249 additional members were to withdraw, and the Assembly of Revision was thereupon to sink back into the position of an ordinary legislature. If the Constitution of 1791 had continued in existence, no change in its articles could, under any circumstances, have been effected in less than six years. But this drag upon hasty legislation was not, in the eyes of the authors of the Constitution, a sufficient guarantee against inconsiderate innovations.[1] They specially provided that the two consecutive legislative bodies which were to meet after the proclamation of the Constitution, should have no authority even to propose the reform of any article contained therein. The intended consequence was that for at least ten years (1791-1801) the bases of the French government should remain unchanged and unchangeable.[2]

The Republicans of 1793 agreed with the Constitutionalists of 1791 in placing the foundations of the State outside the limits of ordinary legislation, but adopted a different method of revision. Constitutional changes were under the Constitution of 1793 made dependent, not on the action of the ordinary legislature, but on the will of the people. Upon the demand of a tenth of the primary assemblies in more than half of the Departments of the Republic, the legislature was bound to convoke all the primary assemblies, and submit to them the question of convening a national convention for the revision of the Con-

[1] A resolution was proposed, though not carried, that the articles of the Constitution should be unchangeable for a period of thirty years. Hélie, *Les Constitutions de la France*, p. 302.

[2] See Constitution of 1791, Tit. vii.

stitution. The vote of these Assemblies thereupon decided for or against the meeting of a convention, and therefore whether a revision should take place.

Assuming that they decided in favour of a revision, a convention, elected in the same manner as the ordinary legislature, was to be forthwith convened, and to occupy itself as regards the Constitution with those subjects only which should have caused (*ont motivé*) the convention to be assembled. On the expressed wish, in short, of the majority of the citizens, a legislature was to be convoked with a limited authority to reform certain articles of the Constitution.[1]

The Republican and Directorial Constitution again, of 1795, rested, like its predecessors, on the assumption that it was of primary importance to make constitutional changes difficult, and also recognised the danger of again creating a despotic sovereign assembly like the famous, and hated, Convention.

The devices by which it was sought to guard against both sudden innovations, and the tyranny of a constituent assembly, can be understood only by one who remembers that, under the Directorial Constitution, the legislature consisted of two bodies, namely, the Council of Ancients, and the Council of Five Hundred. A proposal for any change in the Constitution was necessarily to proceed from the Council of Ancients, and to be ratified by the Council of Five Hundred. After such a proposal had been duly made and ratified thrice in nine years, at periods distant from each other by at least three years, an Assembly of Revision was to be convoked. This Assembly constituted what the Americans now term a "constitutional Convention." It was a body elected *ad hoc*, whose meeting did not in any way suspend the authority of the ordinary legislature, or of the Executive. The authority of the Assembly of Revision was further confined to the revision of those articles submitted to its consideration by the legislature. It could in no case sit for more than three months, and had no other duty than to prepare a plan of reform (*projet de reforme*) for the consideration of the primary Assemblies of the Republic. When once this duty had been performed, the Assembly of Revision was *ipso facto* dissolved. The Constitution not only carefully provided that the Assembly of Revision should take no part in the government, or in ordinary legislation, but also enacted that until the changes proposed by the Assembly should have been accepted by the people the existing Constitution should remain in force.

[1] Constitution du 5 Fructidor, An. III., articles 336-350, Hélie, pp. 436, 463, 464.

The Consular and Imperial Constitutions, all with more or less directness, made changes in the Constitution depend, first, upon a *senatus consultum* or resolution of the Senate; and, next, on the ratification of the change by a popular vote or plebiscite.[1] This may be considered the normal Napoleonic system of constitutional reform. It makes all changes dependent on the will of a body, in effect, appointed by the Executive, and makes them subject to the sanction of a popular vote taken in such a manner that the electors can at best only either reject or, as in fact they always have done, affirm the proposals submitted to them by the Executive. No opportunity is given for debate or for amendments of the proposed innovations. We may assume that even under the form of Parliamentary Imperialism sketched out in the Additional Act of 23rd April 1815, the revision of the Constitution was intended to depend on the will of the Senate and the ratification of the people. The Additional Act is however in one respect very remarkable. It absolutely prohibits any proposal which should have for its object the Restoration of the Bourbons, the re-establishment of feudal rights, of tithes, or of an established Church, or which should in any way revoke the sale of the national domains, or, in other words, should unsettle the title of French landowners. This attempt to place certain principles beyond the influence, not only of ordinary legislation but of constitutional change, recalls to the student of English history the Cromwellian Constitution of 1653, and the determination of the Protector that certain principles should be regarded as "fundamentals" not to be touched by Parliament, nor, as far as would appear, by any other body in the State.

The Republic of 1848 brought again into prominence the distinction between laws changeable by the legislature in its ordinary legislative capacity, and articles of the Constitution changeable only with special difficulty, and by an assembly specially elected for the purpose of revision. The process of change was elaborate. The ordinary legislative body was elected for three years. This body could not itself modify any constitutional article. It could however, in its third year, resolve that a total or partial revision of the Constitution was desirable; such a resolution was invalid unless voted thrice at three sittings, each divided from the other by at least the period of a month, unless 500 members voted, and unless the resolution were affirmed by three-fourths of the votes given.

On the resolution in favour of a constitutional change being duly carried, there was to be elected an assembly of revision.

[1] See Hélie, *Les Constitutions de la France*, pp. 696-698.

This assembly, elected for three months only, and consisting of a larger number than the ordinary legislature, was bound to occupy itself with the revision for which it was convoked, but might, if necessary, pass ordinary laws. It was therefore intended to be a constituent body superseding the ordinary legislature.[1]

The second Empire revived, in substance, the legislative system of the first, and constitutional changes again became dependent upon a resolution of the Senate, and ratification by a popular vote.[2]

The existing Republic is, in many respects, unlike any preceding polity created by French statesmanship. The articles of the Constitution are to be found, not in one document, but in several constitutional laws enacted by the National Assembly which met in 1871. These laws however cannot be changed by the ordinary legislature — the Senate and the Chamber of Deputies—acting in its ordinary legislative character. The two Chambers, in order to effect a change in the constitutional manner, must, in the first place, each separately resolve that a revision of the Constitution is desirable. When each have passed this resolution, the two Chambers meet together, and when thus assembled and voting together as a National Assembly, or Congress, have power to change any part, as they have in fact changed some parts, of the constitutional laws.[3]

I have omitted to notice the constitutional Charter of 1814, granted by Louis XVIII., and the Charter of 1830, accepted by Louis Philippe. The omission is intentional. Neither of these documents contains any special enactments for its amendment. An Englishman would infer that the articles of the Charter could be abrogated or amended by the process of ordinary legislation. The inference may be correct. The constitutionalists of 1814 and 1830 meant to found a constitutional monarchy of the English type, and therefore may have meant the Crown and the two Houses to be a sovereign Parliament. The inference however, as already pointed out,[4] is by no means certain. Louis XVIII. may have meant that the articles of a constitution granted as a charter by the Crown, should be modifiable only at the will of the grantor. Louis Philippe may certainly have wished that the foundations of his system of government should be legally immutable. However this may have been, one thing is clear, namely, that French constitutionalists have, as a rule, held firmly to the view that the foundations of the Constitution ought not

[1] See Constitution, 1848, art. 111.
[2] *Ibid.* 1852, arts. 31, 32, Hélie, p. 1170.
[3] See Constitutional Law, 1875, art. 8.
[4] See pp. 115, 116, *ante.*

to be subject to sudden changes at the will of the ordinary legislature.

Secondly. French statesmen have never fully recognised the inconveniences and the perils which may arise from the excessive rigidity of a constitution. They have hardly perceived that the power of a minority to place a veto for a period of many years on a reform desired by the nation provides an excuse or a reason for revolution.

The authors of the existing Republic have, in this respect, learnt something from experience. They have indeed preserved the distinction between the Constitution and ordinary laws, but they have included but a small number of rules among constitutional articles, and have so facilitated the process of revision as to make the existing chambers all but a sovereign Parliament. Whether this is on the whole a gain or not, is a point on which it were most unwise to pronounce an opinion. All that is here insisted upon is that the present generation of Frenchmen have perceived that a constitution may be too rigid for use or for safety.

Thirdly. An English critic smiles at the labour wasted in France on the attempt to make immutable Constitutions which, on an average, have lasted not quite ten years a piece. The edifice, he reflects, erected by the genius of the first great National Assembly, could not, had it stood, have been legally altered till 1801—that is, till the date when, after three constitutions had broken down, Bonaparte was erecting a despotic Empire. The Directorial Republic of 1795 could not, if it had lasted, have been modified in the smallest particular till 1804, at which date the Empire was already in full vigour.

But the irony of fate does not convict its victims of folly, and, if we look at the state of the world as it stood when France began her experiments in constitution-making, there was nothing ridiculous in the idea that the fundamental laws of a country ought to be changed but slowly, or in the anticipation that the institutions of France would not require frequent alteration. The framework of the English Constitution had, if we except the Union between England and Scotland, stood, as far as foreigners could observe, unaltered for a century, and if the English Parliament was theoretically able to modify any institution whatever, the Parliaments of George III. were at least as little likely to change any law which could be considered constitutional as a modern Parliament to abolish the Crown. In fact it was not till nearly forty years after the meeting of the States General (1829) that any serious modification was made in the form of the

government of England. No one in France or in England could a century ago foresee the condition of pacific revolution to which modern Englishmen had become so accustomed as hardly to feel its strangeness. The newly founded Constitution of the United States showed every sign of stability, and has lasted more than a century without undergoing any material change of form. It was reasonable enough therefore for the men of 1789 to consider that a well-built constitution might stand for a long time without the need of repair.

Fourthly. The errors committed by French constitutionalists have been, if we may judge by the event, in the main, twofold. Frenchmen have always been blind to the fact that a constitution may be undermined by the passing of laws which, without nominally changing its provisions, violate its principles. They have therefore failed to provide any adequate means, such as those adopted by the founders of the United States, for rendering unconstitutional legislation inoperative. They have in the next place, generally, though not invariably, underrated the dangers of convoking a constituent assembly, which, as its meeting suspends the authority of the established legislature and executive, is likely to become a revolutionary convention.

Fifthly. The Directorial Constitution of 1795 is, from a theoretical point of view, the most interesting among the French experiments in the art of constitution-making. Its authors knew by experience the risks to which revolutionary movements are exposed, and showed much ingenuity in their devices for minimising the perils involved in revisions of the constitution. In entrusting the task of revision to an assembly elected *ad hoc*, which met for no other purpose, and which had no authority to interfere with or suspend the action of the established legislative bodies or of the Executive, they formed a true Constitutional Convention in the American sense of that term,[1] and, if we may judge by transatlantic experience, adopted by far the wisest method hitherto invented for introducing changes into a written and rigid Constitution. The establishment, again, of the principle that all amendments voted by the Assembly of Revision must be referred to a popular vote, and could not come into force until accepted by the people, was an anticipation of the Referendum which has now taken firm root in Switzerland, and may, under one shape or another, become in the future a recognised part of all democratic polities. It is worth while to direct the reader's attention to the

[1] See the word "*Convention*" in the American *Encyclopædia of American Science*, and Bryce, *American Commonwealth*, i., App. on Constitutional Conventions, p. 539.

ingenuity displayed by the constitution-makers of 1795, both because their resourcefulness stands in marked contrast with the want of inventiveness which marks the work of most French constitutionalists, and because the incapacity of the Directorial Government, in the work of administration, has diverted attention from the skill displayed by the founders of the Directorate in some parts of their constitutional creation.

NOTE II

DIVISION OF POWERS IN FEDERAL STATES

A STUDENT who wishes to understand the principles which, under a given system of federalism, determine the division of authority between the nation or the central government on the one hand, and the States on the other, should examine the following points:—*first*, whether it is the national government or the States to which belong only "definite" powers, *i.e.* only the powers definitely assigned to it under the Constitution; *secondly*, whether the enactments of the federal legislature can be by any tribunal or other authority nullified or treated as void; *thirdly*, to what extent the Federal government can control the legislation of the separate States; and *fourthly*, the relation of the national government, and to the States respectively, of the body, if such there be, having authority to amend the Constitution.

It is interesting to compare on these points the provisions of four different federal systems.

A. *The United States.*—1. The powers conferred by the Constitution on the United States are strictly "definite" or defined; the powers left to separate the States are "indefinite" or undefined. "The powers not delegated to the United States by the Con-" stitution, nor prohibited by it to the States, are reserved to " the States respectively, or to the people."[1] The consequence is that the United States (that is, the national government) can claim no power not conferred upon the United States either directly or impliedly by the Constitution. Every State in the Union can claim to exercise any power belonging to an independent nation which has not been directly or indirectly taken away from the States by the Constitution.

[1] Constitution of United States, Amendment 10.

2. The legislation of the Federal government is as much subject to the Constitution as the legislation of the States. An enactment, whether of Congress or of a State legislature, which is opposed to the Constitution, is void, and will be treated as such by the Courts.[1]

3. The Federal government has no power to annul or disallow State legislation. The State Constitutions do not owe their existence to the Federal government, nor do they require its sanction. The Constitution of the United States, however, guarantees to every State a Republican Government, and has, it is submitted, the right to put down, or rather is under the duty of putting down, any State Constitution which is not "Republican," whatever be the proper definition of that term.

4. Changes in the Constitution require for their enactment the sanction of three-fourths of the States, and it would appear that constitutionally no State can be deprived of its equal suffrage in the Senate without its consent.[2]

B. *Swiss Confederation.*—1. The authority of the national government or Federal power is definite, the authority of each of the Cantons is indefinite.[3]

2. Federal legislation must be treated as valid by the Courts. But a law passed by the Federal Assembly must, on demand of either 30,000 citizens or of eight Cantons, be referred to a popular vote for approval or rejection. It would appear that the Federal Court can treat as invalid Cantonal laws which violate the Constitution.

3. The Federal authorities have no power of disallowing or annulling a Cantonal law. But the Cantonal Constitutions, and amendments thereto, need the guarantee of the Confederacy. This guarantee will not be given to articles in a Cantonal Constitution which are repugnant to the Federal Constitution, and amendments to a Cantonal Constitution do not, I am informed, come into force until they receive the Federal guarantee.

4. The Federal Constitution can be revised only by a combined majority of the Swiss people, and of the Swiss Cantons. No amendment of the Constitution can be constitutionally effected which is not approved of by a majority of the Cantons.

C. *Canadian Dominion.*—1. The authority of the Dominion, or Federal, government is indefinite or undefined; the authority of the States or Provinces is definite or defined, and indeed confined within narrow limits.[4]

[1] See pp. 140, 141, 147-155, *ante*.
[2] Constitution of United States, art 5.
[3] See Constitution Fédérale, art. 3.
[4] British North America Act, 1867, ss. 91, 92.

From a federal point of view this is the fundamental difference between the Constitution of the Dominion on the one hand, and the Constitution of the United States or of Switzerland on the other.

The Dominion Parliament can legislate on all matters not exclusively assigned to the Provincial legislatures. The Provincial or State Legislatures can legislate only on certain matters exclusively assigned to them. Congress, on the other hand, or the Swiss Federal Assembly, can legislate only on certain definite matters assigned to it by the Constitution; the States or Cantons retain all powers exercised by legislation or otherwise not specially taken away from them by the Constitution.

2. The legislation of the Federal, or Dominion, Parliament is as much subject to the Constitution (*i.e.* the British North America Act, 1867) as the legislation of the Provinces. Any Act passed, either by the Dominion Parliament or by a Provincial Legislature which is inconsistent with the Constitution is void, and will be treated as void by the Courts.

3. The Dominion Government has authority to disallow the Acts passed by a Provincial legislature. This disallowance may be exercised even in respect of Provincial Acts which are constitutional, *i.e.* within the powers assigned to the Provincial legislatures under the Constitution.[1]

4. The Constitution of the Dominion depends on an Imperial statute; it can, therefore, except as provided by the statute itself, be changed only by an Act of the Imperial Parliament. The Parliament of the Dominion cannot, as such, change any part of the Canadian Constitution. It may, however, to a limited extent, by its action when combined with that of a Provincial legislature, modify the Constitution for the purpose of producing uniformity of laws in the Provinces of the Dominion.[2]

But a Provincial legislature can under the British North America Act, 1867, s. 92, sub-s. 1, amend the Constitution of the Province. The law, however, amending the Provincial Constitution is, in common with other Provincial legislation, subject to disallowance by the Dominion government.

D. *German Empire.*—1. The authority under the Constitution of the Imperial (Federal) power is apparently finite or defined, whilst the authority of the States making up the Federation is indefinite or undefined.

This statement however must be understood subject to two

[1] See British North America Act, 1867, s. 90, and Bourinot, *Parliamentary Practice and Procedure*, pp. 76-81.

[2] British North America Act, 1867, s. 94.

limitations: *first*, the powers assigned to the Imperial government are very large; *secondly*, the Imperial legislature can change the Constitution.[1]

2. Imperial legislation at any rate, if carried through in a proper form, cannot be "unconstitutional," but it would appear that State legislation is void, if it conflicts with the constitution, or with Imperial legislation.[2]

3. Whether the Imperial government has any power of annulling a State law on the ground of unconstitutionality is not very clear, but as far as a foreigner can judge, no such power exists under the Imperial constitution.[3] The internal constitutional conflicts which may arise within any State may, under certain circumstances, be ultimately determined by Imperial authority.[4]

4. The Constitution may be changed by the Imperial (Federal) legislature in the way of ordinary legislation. But no law amending the Constitution can be carried, if opposed by fourteen votes in the Federal Council (Bundesrath). This gives in effect a "veto" on constitutional changes to Prussia and to two other States.

Certain rights, moreover, are reserved to several States which cannot be changed under the Constitution, except with the assent of the State possessing the right.[4]

NOTE III

THE RIGHT OF SELF-DEFENCE

How far has an individual a right to defend his person, liberty, and property against unlawful violence by force, or (if we use the word "self-defence" in a wider sense than that usually assigned to it) what are the principles which, under English law, govern the right of self-defence?[5]

The answer to this inquiry is confessedly obscure and indefinite, and does not admit of being given with dogmatic

[1] See Reichsverfassung, arts. 3 and 4.
[2] *Ibid.* arts. 7 and 78.
[3] *Ibid.* arts. 17, 18, 19.
[4] *Ibid.* art. 76.
[5] Report of Criminal Code Commission, 1879, pp. 43-46 [C. 2345], Notes A and B; Stephen, *Criminal Digest*, p. 200; 1 East, P. C. 271-294; Foster, *Discourse II.* ss. 2, 3, pp. 270, 271.

certainty; nor need this uncertainty excite surprise, for the rule which fixes the limit to the right of self-help must, from the nature of things, be a compromise between the necessity, on the one hand, of allowing every citizen to maintain his rights against wrongdoers, and the necessity, on the other hand, of suppressing private warfare. Discourage self-help and loyal subjects become the slaves of ruffians. Over-stimulate self-assertion, and for the arbitrament of the Courts you substitute the decision of the sword or the revolver.

Let it further be remarked that the right of natural self-defence, even when it is recognised by the law, "does not imply "a right of attacking, for instead of attacking one another for "injuries past or impending, men need only have recourse to the "proper tribunals of justice."[1]

A notion is current,[2] for which some justification may be found in the loose dicta of lawyers, or the vague language of legal text-books, that a man may lawfully use any amount of force which is necessary, and not more than necessary, for the protection of his legal rights. This notion, however popular, is erroneous. If pushed to its fair consequences, it would at times justify the shooting of trespassers, and would make it legal for a schoolboy, say of nine years old, to stab a hulking bully of eighteen who attempted to pull the child's ears. Some fifty years ago a worthy Captain Moir carried this doctrine out in practice to its extreme logical results. His grounds were infested by trespassers. He gave notice that he should fire at any wrongdoer who persisted in the offence. He executed his threat, and, after fair warning, shot a trespasser in the arm. The wounded lad was carefully nursed at the captain's expense. He unexpectedly died of the wound. The captain was put on his trial for murder; he was convicted by the jury, sentenced by the judge, and, on the following Monday, hanged by the hangman. He was, it would seem, a well-meaning man, imbued with too rigid an idea of authority. He perished from ignorance of law. His fate is a warning to theorists who incline to the legal heresy that every right may lawfully be defended by the force necessary for its assertion.

The maintainable theories as to the legitimate use of force necessary for the protection or assertion of a man's rights, or in

[1] Stephen, *Commentaries* (8th ed.), iv. pp. 53, 54.

[2] This doctrine is attributed by the Commissioners, who in 1879 reported on the Criminal Code Bill, to Lord St. Leonards. As a matter of criticism it is however open to doubt whether Lord St. Leonards held precisely the dogma ascribed to him. See Criminal Code Bill Commission, Report [C.—2345], p. 44, note B.

other words the possible answers to our inquiry, are, it will be found, twofold.

First Theory. In defence of a man's liberty, person, or property, he may lawfully use any amount of force which is both "necessary"—*i.e.* not more than enough to attain its object—and "reasonable" or "proportionate"—*i.e.* which does not inflict upon the wrongdoer mischief out of proportion to the injury or mischief which the force used is intended to prevent; and no man may use in defending his rights an amount of force which is either unnecessary or unreasonable.

This doctrine of the "legitimacy of necessary and reasonable force" is adopted by the Criminal Code Bill Commissioners. It had better be given in their own words:—

"We take [they write] one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and justify many of our suggestions. It does not seem to have been universally admitted; and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognised as the law in future, but that it is the law at present."[1]

The use of the word "necessary" is, it should be noted, somewhat peculiar, since it includes the idea both of necessity and of reasonableness. When this is taken into account, the Commissioners' view is, it is submitted, as already stated, that a man may lawfully use in defence of his rights such an amount of force as is needful for their protection and as does not inflict, or run the risk of inflicting, damage out of all proportion to the injury to be averted, or (if we look at the same thing from the other side) to the value of the right to be protected. This doctrine is eminently rational. It comes to us recommended by the high authority of four most distinguished judges. It certainly represents the principle towards which the law of England tends to approximate. But there is at least some ground for the suggestion that a second and simpler view more accurately represents the result of our authorities.

Second Theory. A man in repelling an unlawful attack upon

[1] C. C. B. Commission, Report, p. 11.

his person or liberty, is justified in using against his assailant so much force, even amounting to the infliction of death, as is necessary for repelling the attack — *i.e.* as is needed for self-defence; but the infliction upon a wrongdoer of grievous bodily harm, or death, is justified, speaking generally, only by the necessities of self-defence—*i.e.* the defence of life, limb, or permanent liberty.[1]

This theory may be designated as the doctrine of "the legitimacy of force necessary for self-defence." Its essence is that the right to inflict grievous bodily harm or death upon a wrongdoer originates in, and is limited by, the right of every loyal subject to use the means necessary for averting serious danger to life or limb, and serious interference with his personal liberty.

The doctrine of the "legitimacy of necessary and reasonable force" and the doctrine of the "legitimacy of force necessary for self-defence" conduct in the main, and in most instances, to the same practical results.

On either theory *A*, when assaulted by *X*, and placed in peril of his life, may, if he cannot otherwise repel or avoid the assault, strike *X* dead. On the one view, the force used by *A* is both necessary and reasonable; on the other view, the force used by *A* is employed strictly in self-defence. According to either doctrine *A* is not justified in shooting at *X* because *X* is wilfully trespassing on *A's* land. For the damage inflicted by *A* upon *X*—namely, the risk to *X* of losing his life—is unreasonable, that is, out of all proportion to the injury done to *A* by the trespass, and *A* in firing at a trespasser is clearly using force, not for the purpose of self-defence, but for the purpose of defending his property. Both theories, again, are consistent with the elaborate and admitted rules which limit a person's right to wound or slay another even in defence of life or limb.[2] The gist of these rules is that no man must slay or severely injure another until he has done everything he possibly can to avoid the use of extreme

[1] See Stephen, *Commentaries*, i. (8th ed.), p. 139; iii. pp. 243, 244; iv. pp. 53-55.

[2] See Stephen, *Criminal Digest*, art. 200, but compare *Commentaries*, iv. (8th ed.), pp. 54-56; and 1 Hale, P. C. 479. The authorities are not precisely in agreement as to the right of *A* to wound *X* before he has retreated as far as he can. But the general principle seems pretty clear. The rule as to the necessity for retreat by the person attacked must be always taken in combination with the acknowledged right and duty of every man to stop the commission of a felony, and with the fact that defence of a man's house seems to be looked upon by the law as nearly equivalent to the defence of his person. "If a thief assaults a true man, either abroad or in his house, to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony."—1 Hale, P. C. 481. See as to defence of house, 1 East, P. C. 287.

force. *A* is struck by a ruffian, *X*; *A* has a revolver in his pocket. He must not then and there fire upon *X*, but, to avoid crime, must first retreat as far as he can. *X* pursues; *A* is driven up against a wall. Then, and not till then, *A*, if he has no other means of repelling attack, may justifiably fire at *X*. Grant that, as has been suggested, the minute provisos as to the circumstances under which a man assaulted by a ruffian may turn upon his assailant, belong to a past state of society, and are more or less obsolete, the principle on which they rest is, nevertheless, clear and most important. It is, that a person attacked, even by a wrongdoer, may not in self-defence use force which is not "necessary," and that violence is not necessary when the person attacked can avoid the need for it by retreat; or, in other words, by the temporary surrender of his legal right to stand in a particular place—*e.g.* in a particular part of a public square, where he has a lawful right to stand.[1] Both theories, in short, have reference to the use of "necessary" force, and neither countenances the use of any force which is more than is necessary for its purpose. *A* is assaulted by *X*, he can on neither theory justify the slaying or wounding of *X*, if *A* can provide for his own safety simply by locking a door on *X*. Both theories equally well explain how it is that as the intensity of an unlawful assault increases, so the amount of force legitimately to be used in self-defence increases also, and how defence of the lawful possession of property, and especially of a man's house, may easily turn into the lawful defence of a man's person. "A justification of a "battery in defence of possession, though it arose in defence of "possession, yet in the end it is the defence of the person."[2] This sentence contains the gist of the whole matter, but must be read in the light of the caution insisted upon by Blackstone, that the right of self-protection cannot be used as a justification for attack.[3]

Whether the two doctrines may not under conceivable circumstances lead to different results, is an inquiry of great interest, but in the cases which generally come before the Courts, of no great importance. What usually requires determination is how far a man may lawfully use all the force necessary to repel an assault, and for this purpose it matters little whether the test of

[1] Stephen, *Commentaries*, iv. pp. 53, 54; compare 1 Hale, P. C. 481, 482; Stephen, *Criminal Digest*, art. 201; Foster, *Discourse II.* cap. iii. It should be noted that the rule enjoining that a man shall retreat from an assailant before he uses force, applies, it would appear, only to the use of such force as may inflict grievous bodily harm or death.

[2] Rolle's Ab. Trespass, g 8.

[3] Stephen, *Commentaries*, iv. (8th ed.), pp. 53, 54.

legitimate force be its "reasonableness" or its "self-defensive character." If, however, it be necessary to choose between the two theories, the safest course for an English lawyer is to assume that the use of force which inflicts or may inflict grievous bodily harm or death—of what, in short, may be called "extreme" force—is justifiable only for the purpose of strict self-defence.

This view of the right of self-defence, it may be objected, restricts too narrowly a citizen's power to protect himself against wrong.

The weight of this objection is diminished by two reflections.

For the advancement of public justice, in the first place, every man is legally justified in using, and indeed is often bound to use, force, which may, under some circumstances, amount to the infliction of death.

Hence a loyal citizen may lawfully interfere to put an end to a breach of the peace, which takes place in his presence, and use such force as is reasonably necessary for the purpose.[1] Hence, too, any private person who is present when any felony is committed, is bound by law to arrest the felon, on pain of fine and imprisonment if he negligently permit him to escape.[2] "Where a felony "is committed and the felon flyeth from justice, or a dangerous "wound is given, it is the duty of every man to use his best "endeavours for preventing an escape. And if in the pursuit the "party flying is killed, *where he cannot be otherwise overtaken*, this "will be deemed justifiable homicide. For the pursuit was not "barely warrantable; it is what the law requireth, and will punish "the *wilful* neglect of."[3] No doubt the use of such extreme force is justifiable only in the case of felony, or for the hindrance of crimes of violence. But "such homicide as is committed for the "*prevention of any forcible and atrocious crime*, is justifiable . . . "by the law of England . . . as it stands at the present day. If "any person attempts the robbery or murder of another, or "attempts to break open a house *in the night-time*, and shall be "killed in such attempt, either by the party assaulted, or the "owner of the house, or the servant attendant upon either, or "by any other person, and interposing to prevent mischief, the "slayer shall be acquitted and discharged. This reaches not to "any crime unaccompanied with force—as, for example, the "picking of pockets; nor to the breaking open of a house *in the* "*day-time*, unless such entry carries with it an attempt of robbery,

[1] See *Timothy* v. *Simpson*, 1 C. M. and R. 757.
[2] Stephen, *Commentaries*, iv. pp. 336, 347; Hawkins, P. C. book ii. cap. 12.
[3] Foster, *Discourse II.* of Homicide, pp. 271, 272, and compare pp. 273, 274.

"arson, murder, or the like."[1] Acts therefore which would not be justifiable in protection of a person's own property, may often be justified as the necessary means, either of stopping the commission of a crime, or of arresting a felon. Burglars rob *A's* house, they are escaping over his garden wall, carrying off *A's* jewels with them. *A* is in no peril of his life, but he pursues the gang, calls upon them to surrender, and having no other means of preventing their escape, knocks down one of them, *X*, who dies of the blow; *A*, it would seem, not only is innocent of guilt, but has also discharged a public duty.

Let it be added that where *A* may lawfully inflict grievous bodily harm upon *X*—*e.g.* in arresting him—*X* acts unlawfully in resisting *A*, and is responsible for the injury caused to *A* by *X's* resistance.[2]

Every man, in the second place, acts lawfully as long as he merely exercises his legal rights, and he may use such moderate force as in effect is employed simply in the exercise of such rights.

A is walking along a public path on his way home, *X* tries to stop him; *A* pushes *X* aside, *X* has a fall and is hurt. *A* has done no wrong; he has stood merely on the defensive and repelled an attempt to interfere with his right to go along a public way. *X* thereupon draws a sword and attacks *A* again. It is clear that if *A* can in no other way protect himself — *e.g.* by running away from *X*, or by knocking *X* down—he may use any amount of force necessary for his self-defence. He may stun *X* or fire at *X*.

Here, however, comes into view the question of real difficulty. How far is *A* bound to give up the exercise of his rights, in this particular instance the right to walk along a particular path, rather than risk the maiming or the killing of *X*?

Suppose, for example, that *A* knows perfectly well that *X* claims, though without any legal ground, a right to close the particular footpath, and also knows that, if *A* turns down another road which will also bring him home, though at the cost of a slightly longer walk, he will avoid all danger of an assault by *X*, or of being driven, in so-called self-defence, to inflict grievous bodily harm upon *X*.

Of course the case for *A's* right to use any force necessary for his purpose may be put in this way. *A* has a right to push *X* aside. As *X's* violence grows greater, *A* has a right to repel it. He may thus turn a scuffle over a right of way into a struggle

[1] Stephen, *Commentaries*, iv. (8th ed.), pp. 49, 50.
[2] Foster, *Discourse II.* p. 272.

for the defence of *A's* life, and so justify the infliction even of death upon *X*. But this manner of looking at the matter is unsound. Before *A* is justified in, say, firing at *X* or stabbing *X*, he must show distinctly that he comes within one at least of the two principles which justify the use of extreme force against an assailant. But if he can avoid *X's* violence by going a few yards out of his way, he cannot justify his conduct under either of these principles. The firing at *X* is not "reasonable," for the damage inflicted by *A* upon *X* in wounding him is out of all proportion to the mischief to *A* which it is intended to prevent—namely, his being forced to go a few yards out of his way on his road home. The firing at *X*, again, is not done in strict self-defence, for *A* could have avoided all danger by turning into another path. *A* uses force not for the defence of his life, but for the vindication of his right to walk along a particular pathway. That this is the true view of *A's* position is pretty clearly shown by the old rules enjoining a person assaulted to retreat as far as he can before he grievously wounds his assailant.

Reg. v. *Hewlett*, a case tried as late as 1858, contains judicial doctrine pointing in the same direction. *A* was struck by *X*, *A* thereupon drew a knife and stabbed *X*. The judge laid down that "unless the prisoner [*A*] apprehended robbery or some "similar offence, or danger to life, or serious bodily danger "(not simply being knocked down), he would not be justified "in using the knife in self-defence."[1] The essence of this dictum is, that the force used by *A* was not justifiable, because, though it did ward off danger to *A*—namely, the peril of being knocked down—it was not necessary for the defence of *A's* life or limb. The case is a particularly strong one, because *X* was not a person asserting a supposed right, but a simple wrongdoer.

Let the last case be a little varied. Let *X* be not a ruffian but a policeman, who, acting under the orders of the Commissioner of Police, tries to prevent *A* from entering the Park at the Marble Arch. Let it further be supposed that the Commissioner has taken an erroneous view of his authority, and that therefore the attempt to hinder *A* from going into Hyde Park at the particular entrance does not admit of legal justification. *X*, under these circumstances, is therefore legally in the wrong, and *A* may, it would seem,[2] push by *X*. But is there any reason for saying that if *A* cannot simply push *X* aside he can lawfully use the

[1] 1 Foster and Finlason, 91, per Crowder, J.

[2] It is of course assumed in this imaginary case that Acts of Parliament are not in force empowering the Commissioner of Police to regulate the use of the

force necessary — *e.g.* by stabbing *X*—to effect an entrance? There clearly is none. The stabbing of *X* is neither a reasonable nor a self-defensive employment of force.

A dispute, in short, as to legal rights must be settled by legal tribunals, "for the Sovereign and his Courts are the *vindices in-* "*juriam*, and will give to the party wronged all the satisfaction "he deserves;"[1] no one is allowed to vindicate the strength of his disputed rights by the force of his arm. Legal controversies are not to be settled by blows. A bishop who in the last century attempted, by means of riot and assault, to make good his claim to remove a deputy registrar, was admonished from the Bench that his view of the law was erroneous, and was saved from the condemnation of the jury only by the rhetoric and the fallacies of Erskine.[2]

From whatever point therefore the matter be approached, we come round to the same conclusion. The only undoubted justification for the use of extreme force in the assertion of a man's rights is, subject to the exceptions or limitations already mentioned, to be found in, as it is limited by, the necessities of strict self-defence.

NOTE IV

QUESTIONS CONNECTED WITH THE RIGHT OF PUBLIC MEETING

FOUR important questions connected with the right of public meeting require consideration.

These inquiries are: *first*, whether there exist any general right of meeting in public places? *secondly*, what is the meaning of the term "an unlawful assembly"? *thirdly*, what are the rights of the Crown or its servants in dealing with an unlawful assembly? and *fourthly*, what are the rights possessed by the members of a lawful assembly when the meeting is interfered with or dispersed by force?

For the proper understanding of the matters under discussion,

right to enter into the Park. It is not my intention to discuss the effect of the Metropolitan Police Acts, or to intimate any opinion as to the powers of the Commissioner of Police.

[1] Stephen, *Commentaries*, iv. (8th ed.), p. 55.

[2] *The Bishop of Bangor's Case*, 26 St. Tr. 463.

it is necessary to grasp firmly the truth and the bearing of two indisputable but often neglected observations.

The first is that English law does not recognise any special right of public meeting either for a political or for any other purpose.[1]

The right of assembling is nothing more than the result of the view taken by our Courts of individual liberty of person and individual liberty of speech.

Interference therefore with a lawful meeting is not an invasion of a public right, but an attack upon the individual rights of *A* or *B*, and must generally resolve itself into a number of assaults upon definite persons, members of the meeting. A wrongdoer who disperses a crowd is not indicted or sued for breaking up a meeting, but is liable (if at all) to a prosecution or an action for assaulting *A*, a definite member of the crowd.[2] Hence further the answer to the question how far a lawful meeting may resist any attempt to disperse the assembly, depends at bottom on a determination of the methods prescribed by law to a given citizen *A*, for punishing or repelling an assault.

The second of these preliminary observations is that the most serious of the obscurities which beset the law of public meetings arise from the difficulty of determining how far a citizen is legally justified in using force for the protection of his person, liberty, or property, or, if we may use the word "self-defence" in its widest sense, from uncertainty as to the true principles which govern the right of self-defence.[3]

The close connection of these introductory remarks with the questions to be considered will become apparent as we proceed.

I. *Does there exist any general right of meeting in public places?*

The answer is easy. No such right is known to the law of England.

Englishmen, it is true, meet together for political as well as for other purposes, in parks, on commons, and in other open spaces accessible to all the world. It is also true that in England meetings held in the open air are not subject, as they are in other countries—for instance, Belgium—to special restrictions. A crowd gathered together in a public place, whether they assemble for amusement or discussion, to see an acrobat perform his somersaults, or to hear a statesman explain his tergiversations, stand in the same position as a meeting held for the same purpose in a

[1] See chap. vii. *ante*.

[2] See *Redford* v. *Birley*, 1 St. Tr. N. S. 1071.

[3] See Note iii. *ante*.

hall or a drawing-room. An assembly convened, in short, for a lawful object, assembled in a place which the meeting has a right to occupy, and acting in a peaceable manner which inspires no sensible person with fear, is a lawful assembly, whether it be held in Exeter Hall, in the grounds of Hatfield or Hawarden, or in the London parks. With such a meeting no man has a right to interfere, and for attending it no man incurs legal penalties.

But the law which does not prohibit open-air meetings does not, speaking generally, provide that there shall be spaces where the public can meet in the open air, either for political discussion or for amusement. There may of course be, and indeed there are, special localities which by statute, by custom or otherwise, are so dedicated to the use of the public as to be available for the purpose of public meetings. But speaking in general terms, the Courts do not recognise certain spaces as set aside for that end. In this respect, again, a crowd of a thousand people stand in the same position as an individual person. If *A* wants to deliver a lecture, to make a speech, or to exhibit a show, he must obtain some room or field which he can legally use for his purpose. He must not invade the rights of private property—*i.e.* commit a trespass. He must not interfere with the convenience of the public—*i.e.* create a nuisance.

The notion that there is such a thing as a right of meeting in public places arises from more than one confusion or erroneous assumption. The right of public meeting—that is, the right of all men to come together in a place where they may lawfully be for any lawful purpose, and especially for political discussion—is confounded with the totally different alleged right of every man to use for the purpose of holding a meeting any place which in any sense is open to the public. The two rights, did they both exist, are essentially different, and in many countries are regulated by totally different rules. It is assumed again that squares, streets, or roads, which every man may lawfully use, are necessarily available for the holding of a meeting. The assumption is false. A crowd blocking up a highway will probably be a nuisance in the legal, no less than in the popular, sense of the term, for they interfere with the ordinary citizen's right to use the locality in the way permitted to him by law. Highways, indeed, are dedicated to the public use, but they must be used for passing and going along them,[1] and the legal mode of use negatives the claim of politicians to use a highway as a forum, just as it excludes the claim of actors to turn it into an open-air theatre. The crowd

[1] *Dovaston* v. *Payne*, 2 Hy. Bl. 527.

who collect, and the persons who cause a crowd, for whatever purpose, to collect in a street, create a nuisance.[1] The claim on the part of persons so minded to assemble in any numbers and for so long a time as they please, to remain assembled "to the "detriment of others having equal rights, is in its nature irrecon- "cilable with the right of free passage, and there is, so far as we "have been able to ascertain, no authority whatever in favour of "it."[2] The general public cannot make out a right to hold meetings even on a common.[3] The ground of popular delusions as to the right of public meeting in open places is at bottom the prevalent notion that the law favours meetings held for the sake of political discussion or agitation, combined with the tacit assumption that when the law allows a right it provides the means for its exercise. No ideas can be more unfounded. English law no more favours or provides for the holding of political meetings than for the giving of public concerts. A man has a right to hear an orator as he has a right to hear a band, or to eat a bun. But each right must be exercised subject to the laws against trespass, against the creation of nuisances, against theft.

The want of a so-called forum may, it will be said, prevent ten thousand worthy citizens from making a lawful demonstration of their political wishes. The remark is true, but, from a lawyer's point of view, irrelevant. Every man has a right to see a Punch show, but if Punch is exhibiting in a theatre for money, no man can see him who cannot provide the necessary shilling. Every man has a right to hear a band, but if there be no place where a band can perform without causing a nuisance, then thousands of excellent citizens must forego their right to hear music. Every man has a right to worship God after his own fashion, but if all the landowners of a parish refuse ground for the building of a Wesleyan chapel, parishioners must forego attendance at a Methodist place of worship.

II. *What is the meaning of the term "an unlawful assembly"?*

The expression "unlawful assembly" does not signify any meeting of which the purpose is unlawful. If, for example, five cheats meet in one room to concoct a fraud, to indite a libel, or to forge a bank-note, or to work out a scheme of perjury, they assemble for an unlawful purpose, but they can hardly be said to

[1] *Ex parte Lewis*, 21 Q. B. D. 191, 197; *per Curiam*.

[2] *Bailey* v. *Williamson*, L. R. 8 Q. B. 118; *De Morgan* v. *Metropolitan Board of Works*, 5 Q. B. D. 155.

[3] *Ex parte Carlile*, 6 C. and P. 628, 636; the *Tramways Case*, the *Times*, 7th September 1888.

nstitute an "unlawful assembly." These words are, in English w, a term of art. This term has a more or less limited and finite signification, and has from time to time been defined by fferent authorities[1] with varying degrees of precision. The finitions vary, for the most part, rather in words than in bstance. Such differences as exist have, however, a twofold portance. They show, in the first place, that the circumstances hich may render a meeting an unlawful assembly have not been solutely determined, and that some important questions with gard to the necessary characteristics of such an assembly are pen to discussion. They show, in the second place, that the les determining the right of public meeting are the result of dicial legislation, and that the law which has been created may further developed by the judges, and hence that any lawyer nt on determining the character of a given meeting must con-der carefully the tendency, as well as the words, of reported dgments.

The general and prominent characteristic of an unlawful sembly (however defined) is, to any one who candidly studies e authorities, clear enough. It is a meeting of persons who ther intend to commit or do commit, or who lead others to ntertain a reasonable fear that the meeting will commit, a breach f the peace. This actual or threatened breach of the peace is, to speak, the essential characteristic or "property" connoted by e term "unlawful assembly." A careful examination, however, f received descriptions or definitions and of the authoritative tatements contained in Sir James Stephen's *Digest* and in the raft Code drawn by the Criminal Code Commissioners, enables n inquirer to frame a more or less accurate definition of an unlawful assembly."

It may (it is submitted) be defined as any meeting of three r more persons who—

(i.) Assemble to commit, or, when assembled do commit, a breach of the peace; or

(ii.) Assemble with intent to commit a crime by open force; or

(iii.) Assemble for any common purpose, whether lawful or unlawful, in such a manner as to give firm and courageous

[1] See Hawkins, P. C. book i. cap. 65, ss. 9, 11; Blackstone, iv. p. 146; Stephen, *Commentaries* (8th ed.), iv. p. 213; Stephen, *Criminal Digest*, art. 70; Criminal Code Bill Commission, Draft Code, sec. 84, p. 80; *Rex* v. *Pinney*, 5 C. and P. 254; *Rex* v. *Hunt*, 1 St. Tr. N. S. 171; *Redford* v. *Birley*, *ibid.* 1071; *Rex* v. *Morris*, *ibid.* 521; *Beatty* v. *Gillbanks*, 9 Q. B. D. 308; *Reg.* v. *M'Naughton* (Irish) 14 Cox, C. C. 576; *O'Kelly* v. *Harvey* (Irish), 15 Cox, C. C. 435.

persons in the neighbourhood of the assembly reasonab cause to fear a breach of the peace, in consequence of th aesembly; or

[(iv.) Assemble with intent to excite disaffection among th Crown's subjects, to bring the Constitution and Gover ment of the realm, as by law established, into contemp and generally to carry out, or prepare for carrying ou an unlawful conspiracy.[1]]

The following points require notice:—

1. A meeting is an unlawful assembly which either disturb the peace, or inspires reasonable persons in its neighbourhoo with a fear that it will cause a breach of the peace.

Hence the state of public feeling under which a meeting convened, the class and the number of the persons who com together, the mode in which they meet (whether, for instanc they do or do not carry arms), the place of their meeting (whethe for instance, they assemble on an open common or in the midd of a populous city), and various other circumstances, must all b taken into account in determining whether a given meeting is a unlawful assembly or not.

2. A meeting need not be the less an unlawful assembl because it meets for a legal object.

A crowd collected to petition for the release of a prisoner c to see an acrobatic performance, though meeting for a lawfu object, may easily be, or turn into, an unlawful assembly. Th lawfulness of the aim with which a hundred thousand peopl assemble may affect the reasonableness of fearing that a breac of the peace will ensue. But the lawfulness of their object doe not of itself make the meeting lawful.

3. A meeting for an unlawful purpose is not, as alread pointed out, necessarily an unlawful assembly.

The test of the character of the assembly is whether th meeting does or does not contemplate the use of unlawful force or does or does not inspire others with reasonable fear that un lawful force will be used—*i.e.* that the Queen's peace will b broken.

4. There is some authority for the suggestion that a meetin for the purpose of spreading sedition, of exciting class agains class, or of bringing the Constitution of the country into contempt is *ipso facto* an unlawful assembly,[2] and that a meeting to pro

[1] *O'Kelly* v. *Harvey* (Irish), 15 Cox C. C. 435. The portion of this definitio contained in brackets must be considered as, in England, of doubtful authority.

[2] See *Redford* v. *Birley*, 1 St. Tr. N. S. 1071; *Rex* v. *Hunt*, *ibid.* 171; *Re* v. *Morris*, *ibid.* 521; *Reg.* v. *M'Naughton* (Irish), 14 Cox, C. C. 572; *O'Kell* v. *Harvey* (Irish), 15 Cox C. C. 435.

note an unlawful conspiracy of a public character, even though t does not directly menace a breach of the peace, is also an unawful assembly.

This is a matter on which it is prudent to speak with reserve nd hesitation, and to maintain a suspended judgment until the oint suggested has come fairly before the English Courts. The true rule (possibly) may be, that a meeting assembled for he promotion of a purpose which is not only criminal, but also f carried out will promote a breach of the peace, is itself an unawful assembly.

5. Two questions certainly remain open for decision.

Is a meeting an unlawful assembly because, though the meeting itself is peaceable enough, it excites reasonable dread of future disturbance to the peace of the realm; as where political leaders address a meeting in terms which it is reasonably supposed may, after the meeting has broken up, excite insurrection?

The answer to this inquiry is doubtful.[1]

Need again the breach of the peace, or fear thereof, which gives a meeting the character of illegality, be a breach caused by the members of the meeting?

The one English authority[2] on the subject answers this inquiry in the affirmative. A meeting is not an unlawful assembly because it excites persons who dislike the meeting to break the peace. Thus a meeting held by a handful of Protestants for the denunciation of the confessional or of saint-worship, in the midst of a poor and excited Roman Catholic population, is not an unlawful meeting, though every one knows that its consequence is likely to be riot and bloodshed. To this view the Irish Courts, which no less than the English tribunals are exponents of the common law, do not assent. It is possible that common sense may also refuse its sanction to the doctrine now laid down by the English Queen's Bench Division. Here, again, an inquirer may be recommended to suspend his judgment.

[1] See *Rex* v. *Hunt*, 1 St. Tr. N. S. 171; *Rex* v. *Dewhurst*, *ibid.* 530, 599. "Upon the subject of terror, there may be cases in which, from the general "appearance of the meeting, there could be no fear of immediate mischief pro- "duced before that assembly should disperse; and I am rather disposed to think "that the probability or likelihood of immediate terror before the meeting should "disperse is necessary in order to fix the charge upon that second count to which I "have drawn your attention. But if the evidence satisfies you there was a present "fear produced of future rising, which future rising would be a terror and alarm to "the neighbourhood, I should then desire that you would present that as your "finding in the shape of what I should then take it to be, a special verdict": per Bailey, J.

[2] *Beatty* v. *Gillbanks*, 9 Q. B. D. 308.

III. *What are the rights of the Crown or its servants in dealing with an unlawful assembly?*

1. Every person who takes part in an unlawful assembly is guilty of a misdemeanour, and the Crown may therefore prosecute every such person for his offence.

Whether a given man *A*, who is present at a particular meeting, does thereby incur the guilt of "taking part" in an unlawful assembly, is in each case a question of fact.

A, though present, may not be a member of the meeting; he may be there accidentally; he may know nothing of its character; the crowd may originally have assembled for a lawful purpose; the circumstances, *e.g.*, the production of arms, or the outbreak of a riot, which render the meeting unlawful, may have taken place after it began, and in these transactions *A* may have taken no part. Hence the importance of an official notice, *e.g.*, by a Secretary of State, or by a magistrate, that a meeting is convened for a criminal object. A citizen after reading the notice or proclamation, goes to the meeting at his peril. If it turns out in fact an unlawful assembly, he cannot plead ignorance of its character as a defence against the charge of taking part in the meeting.[1]

2. Magistrates, policemen, and all loyal citizens not only are entitled, but indeed are bound to disperse an unlawful assembly, and, if necessary, to do so by the use of force; and it is a gross error to suppose that they are bound to wait until a riot has occurred, or until the Riot Act has been read.[2] The prevalence of this delusion was the cause, during the Gordon Riots, of London being for days in the hands of the mob. The mode of dispersing a crowd when unlawfully assembled, and the extent of force which it is reasonable to use, differ according to the circumstances of each case.

3. If any assembly becomes a riot—*i.e.* has begun to act in a tumultuous manner to the disturbance of the peace—a magistrate on being informed that twelve or more persons are unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, is bound to make the short statutable proclamation which is popularly known as "reading the Riot Act."[3]

The consequences are as follows: first, that any twelve rioters who do not disperse within an hour thereafter, are guilty of felony; and, secondly, that the magistrate and those acting with him may, after such hour, arrest the rioters and disperse the

[1] *Reg.* v. *Fursey*, 6 C. and P. 81.

[2] *Reg.* v. *Neale*, 9 C. and P. 431; *Burdett* v. *Abbot*, 4 Taunt. 401, 449. See pp. 267, 268, *ante*.

[3] 1 Geo. I. stat. 2, cap. 5, s. 2.

meeting by the employment of any amount of force necessary for the purpose, and are protected from liability for hurt inflicted or death caused in dispersing the meeting. The magistrates are, in short, empowered by the Riot Act to read the proclamation before referred to, and thereupon, after waiting for an hour, to order troops and constables to fire upon the rioters, or charge them sword in hand.[1] It is particularly to be noticed that the powers given to magistrates for dealing with riots under the Riot Act in no way lessen the common law right of a magistrate, and indeed of every citizen, to put an end to a breach of the peace, and hence to disperse an unlawful assembly.

IV. *What are the rights possessed by the members of a lawful assembly when the meeting is interfered with or dispersed by force?*

The Salvation Army assemble in a place where they have a right to meet, say an open piece of land placed at their disposal by the owner, and for a lawful purpose, namely, to hear a sermon. Certain persons who think the meeting either objectionable or illegal attempt to break it up, or do break it up, by force. What, under these circumstances, are the rights of the Salvationists who have come to listen to a preacher? This in a concrete form is the problem for consideration.[2]

An attempt, whether successful or not, to disperse a lawful assembly involves assaults of more or less violence upon the persons *A*, *B*, and *C* who have met together. The wrong thus done by the assailants is, as already pointed out, a wrong done, not to the meeting—a body which has legally no collective rights—but to *A*, *B*, or *C*, an individual pushed, hustled, struck, or otherwise assaulted.

Our problem is, then, in substance—What are the rights of *A*, the member of a meeting, when unlawfully assaulted? And this inquiry, in its turn, embraces two different questions, which, for clearness sake, ought to be carefully kept apart from each other.

First. What are the remedies of *A* for the wrong done to him by the assault?

The answer is easy. *A* has the right to take civil, or (subject to one reservation) criminal proceedings against any person, be he an officer, a soldier, a commissioner of police, a magistrate, a policeman, or a private ruffian, who is responsible for the assault

[1] See Stephen, *Hist. Crim. Law*, i. 203; Criminal Code Bill Commission, Draft Code, ss. 88, 89.

[2] For the sake of convenience, I have taken a meeting of the Salvation Army as a typical instance of a lawful public meeting. It should, however, be constantly remembered that the rights of the Salvationists are neither more nor less than those of any other crowd lawfully collected together—*e.g.* to hear a band of music.

upon *A*. If, moreover, *A* be killed, the person or persons by whom his death has been caused may be indicted, according to circumstances, for manslaughter or murder.

This statement as to *A's* rights, or (what is, however, the same thing from another point of view) as to the liabilities of *A's* assailants, is made subject to one reservation. There exists considerable doubt as to the degree and kind of liability of soldiers (or possibly of policemen) who, under the orders of a superior, do some act (*e.g.* arrest *A* or fire at *A*) which is not on the face of it unlawful, but which turns out to be unlawful because of some circumstance of which the subordinate was not in a position to judge, as, for example, because the meeting was not technically an unlawful assembly, or because the officer giving the order had in some way exceeded his authority.

"I hope [says Willes, J.] I may never have to determine that difficult question, how far the orders of a superior officer are a justification. Were I compelled to determine that question, I should probably hold that the orders are an absolute justification in time of actual war—at all events, as regards enemies or foreigners—and, I should think, even with regard to English-born subjects of the Crown, unless the orders were such as could not legally be given. I believe that the better opinion is, that an officer or soldier, acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders."[1]

A critic were rash who questioned the suggestion of a jurist whose dicta are more weighty than most considered judgments. The words, moreover, of Mr. Justice Willes enounce a principle which is in itself pre-eminently reasonable. If its validity be not admitted, results follow as absurd as they are unjust: every soldier is called upon to determine on the spur of the moment legal subtleties which, after a lengthy consultation, might still perplex experienced lawyers, and the private ordered by his commanding officer to take part in the suppression of a riot runs the risk, if he disobeys, of being shot by order of a court-martial, and, if he obeys, of being hanged under the sentence of a judge. Let it further be carefully noted that the doctrine of Mr. Justice Willes, which is approved of by the Criminal Code Commissioners,[2] applies, it would seem, to criminal liability only. The soldier or policeman who, without full legal justification, assaults or arrests *A* incurs (it is submitted), even though acting under orders, full civil liability.

Secondly. How far is *A* entitled to maintain by force against

[1] *Keighly v. Bell*, 4 F. and F. 763, 790, per Willes, J.
[2] See C. C. B. Commission, Draft Code, ss. 49-53.

all assailants his right to take part in a lawful public meeting, or, in other words, his right to stand in a place where he lawfully may stand—*e.g.* ground opened to *A* by the owner, for a purpose which is in itself lawful—*e.g.* the hearing of an address from a captain of the Salvation Army?

In order to obtain a correct answer to this inquiry we should bear in mind the principles which regulate the right of self-defence,[1] and should further consider what may be the different circumstances under which an attempt may be made without legal warrant to disperse a meeting of the Salvation Army. The attack upon the meeting, or in other words upon *A*, may be made either by mere wrongdoers, or by persons who believe, however mistakenly, that they are acting in exercise of a legal right or in discharge of a legal duty. Let each of these cases be examined separately.

Let us suppose, in the first place, that the Salvationists, and *A* among them, are attacked by the so-called Skeleton Army or other roughs, and let it further be supposed that the object of the assault is simply to break up the meeting, and that therefore, if *A* and others disperse, they are in no peril of damage to life or limb.

A and his friends may legally, it would seem, stand their ground, and use such moderate force as amounts to simple assertion of the right to remain where they are. *A* and his companions may further give individual members of the Skeleton Army in charge for a breach of the peace. It may, however, happen that the roughs are in large numbers, and press upon the Salvationists so that they cannot keep their ground without the use of firearms or other weapons. The use of such force is in one sense necessary, for the Salvationists cannot hold their meeting without employing it. Is the use of such force legal? The strongest way of putting the case in favour of *A* and his friends is that, in firing upon their opponents, they are using force to put down a breach of the peace. On the whole, however, there can, it is submitted, be no doubt that the use of firearms or other deadly weapons, to maintain their right of meeting, is under the circumstances not legally justifiable. The principle on which extreme acts of self defence against a lawless assailant cannot be justified until the person assaulted has retreated as far as he can, is applicable to *A*, *B*, *C*, etc., just as it would be to *A* singly. Each of the Salvationists is defending, under the supposed circumstances, not his life, but his right to stand on a given plot of ground.

[1] See Note iii. p. 405, *ante*.

Next, suppose that the attempt to disperse the Salvationists is made, not by the Skeleton Army, but by the police, who act under the order of magistrates who hold *bonâ fide*, though mistakenly,[1] that a notice from the Home Secretary forbidding the Army to meet, makes its meeting an unlawful assembly.

Under these circumstances, the police are clearly in the wrong. A policeman who assaults *A*, *B*, or *C*, does an act not admitting of legal justification. Nor is it easy to maintain that the mere fact of the police acting as servants of the Crown in supposed discharge of their duty makes it of itself incumbent upon *A* to leave the meeting.

The position, however, of the police differs in two important respects from that of mere wrongdoers. Policeman *X*, when he tells *A* to move on, and compels him to do so, does not put *A* in peril of life or limb, for *A* knows for certain that, if he leaves the meeting, he will not be further molested, or that if he allows himself to be peaceably arrested, he has nothing to dread but temporary imprisonment and appearance before a magistrate, who will deal with his rights in accordance with law. Policeman *X*, further, asserts *bonâ fide* a supposed legal right to make *A* withdraw from a place where *X* believes *A* has no right to stand; there is a dispute between *A* and *X* as to a matter of law. This being the state of affairs, it is at any rate fairly arguable that *A*, *B*, and *C* have a right to stand simply on the defensive, and remain where they are as long as they can do so without inflicting grievous bodily harm upon *X* and other policemen. Suppose, however, as is likely to be the fact, that, under the pressure of a large body of constables, the Salvationists cannot maintain their meeting without making use of arms—*e.g.* using bludgeons, swords, pistols, or the like. They have clearly no right to make use of this kind of force. *A* and his friends are not in peril of their lives, and to kill a policeman in order to secure *A* the right of standing in a particular place is to inflict a mischief out of all proportion to the importance of the mischief to *A* which he wishes to avert. *A*, therefore, if he stabs or stuns *X*, can on no theory plead the right of self-defence. *A* and *X* further are, as already pointed out, at variance on a question of legal rights. This is a matter to be determined not by arms, but by an action at law.

Let it further be noted that the supposed case is the most unfavourable for the police which can be imagined. They may well, though engaged in hindering what turns out to be a lawful meeting, stand in a much better situation than that of assailants.

[1] See *Beatty* v. *Gillbanks*, 9 Q. B. D. 308.

The police may, under orders, have fully occupied and filled up the ground which the Salvationists intend to use. When the Salvationists begin arriving, they find there is no place where they can meet. Nothing but the use of force, and indeed of extreme force, can drive the police away. This force the Salvation Army cannot use; if they did, they would be using violence not on any show of self-defence, but to obtain possession of a particular piece of land. Their only proper course is the vindication of their rights by proceedings in Court.

Of the older cases, which deal with the question how far it is justifiable to resist by violence an arrest made by an officer of justice without due authority, it is difficult to make much use for the elucidation of the question under consideration,[1] for in these cases the matter discussed seems often to have been not whether *A's* resistance was justifiable, but whether it amounted to murder or only to manslaughter. There are, however, one or two more or less recent decisions which have a real bearing on the right of the members of a public meeting to resist by force attempts to disperse it. And these cases are, on the whole, when properly understood, not inconsistent with the inferences already drawn from general principles. The doctrine laid down in *Reg.* v. *Hewlett*,[2] that *A* ought not to inflict grievous bodily harm even upon *X* a wrongdoer unless in the strictest self-defence, is of the highest importance. *Rex* v. *Fursey*,[3] a decision of 1833, has direct reference to the right of meeting. At a public meeting held that year in London, *A* carried an American flag which was snatched from him by *X*, a policeman, whereupon *A* stabbed *X*. He was subsequently indicted under 9 Geo. I. c. 31, s. 12, and it appears to have been laid down by the judge that though, if the meeting was a legal one, *X* had no right to snatch away *A's* flag, still that even on the supposition that the meeting was a lawful assembly, *A*, if *X* had died of his wound, would have been guilty either of manslaughter, or very possibly of murder. Quite in keeping with *Rex* v. *Fursey* is the recent case of *Reg.* v. *Harrison*.[4] Some of the expressions attributed, in a very compressed newspaper report, to the learned judge who tried the case, may be open to criticism, but the principle involved in the defendant's conviction, namely, that a ruffian cannot assert his alleged right to walk down a particular street

[1] See, *e.g. Dixon's Case*, 1 East, P. C. 313; *Borthwick's Case*, *ibid.*; *Wither's Case*, 1 East, P. C. 233, 309; *Tooley's Case*, 2 Lord Raymond, 1296.

[2] 1 F. and F. 91.

[3] 6 C. and P. 81, 86, 87, summing up of Gaselee, J., and compare Criminal Code Commission Report, pp. 43, 44.

[4] The *Times*, 19th December 1887.

by stunning or braining a policeman, or a good citizen who is helping the policeman, is good law no less than good sense.

Nor does the claim to assert legal rights by recourse to pistols or bludgeons receive countenance from two decisions occasionally adduced in its support.

The one is *Beatty* v. *Gillbanks*.[1] This case merely shows that a lawful meeting is not rendered an unlawful assembly simply because ruffians try to break it up, and, in short, that the breach of the peace which renders a meeting unlawful must be a breach caused by the members of the meeting, and not by wrongdoers who wish to prevent its being held.[2]

The second is *M'Clenaghan* v. *Waters*.[3] The case may certainly be so explained as to lay down the doctrine that the police when engaged under orders in dispersing a lawful meeting are not engaged in the "execution of their duty," and that therefore the members of the meeting may persist in holding it in spite of the opposition of the police. Whether this doctrine be absolutely sound is open to debate. It does not necessarily, however, mean more than that a man may exercise a right, even though he has to use a moderate amount of force, against a person who attempts to hinder the exercise of the right. But *M'Clenaghan* v. *Waters* certainly does not decide that the member of a lawful assembly may exercise whatever amount of force is necessary to prevent its being dispersed, and falls far short of justifying the proceedings of a Salvationist who brains a policeman rather than surrender the so-called right of public meeting. It is, however, doubtful whether *M'Clenaghan* v. *Waters* really supports even the doctrine that moderate resistance to the police is justifiable in order to prevent the dispersing of a lawful assembly. The case purports to follow *Beatty* v. *Gillbanks*, and therefore the Court cannot be taken as intentionally going beyond the principle laid down in that case. The question for the opinion of the Court, moreover, in *M'Clenaghan* v. *Waters* was, "whether upon the facts stated the police at the time of "their being assaulted by the appellants (Salvationists) were "legally justified in interfering to prevent the procession from "taking place;" or, in other words, whether the meeting of the Salvationists was a lawful assembly? To this question, in the face of *Beatty* v. *Gillbanks*, but one reply was possible. This answer the Court gave: they determined "that in taking part "in a procession the appellants were doing only an act strictly "lawful, and the fact that that act was believed likely to cause

[1] 9 Q. B. D. 308.

[2] As already pointed out, the principle maintained in *Beatty* v. *Gillbanks* is itself open to some criticism.

[3] The *Times*, 18th July 1882.

"others to commit such as were unlawful, was no justification for "interfering with them." Whether the Court determined anything more is at least open to doubt, and if they did determine, as alleged, that the amount of the resistance offered to the police was lawful, this determination is, to say the least, not inconsistent with the stern punishment of acts like that committed by the prisoner Harrison.

No one, however, can dispute that the line between the forcible exercise of a right in the face of opposition, and an unjustifiable assault on those who oppose its exercise, is a fine one, and that many nice problems concerning the degree of resistance which the members of a lawful meeting may offer to persons who wish to break it up are at present unsolved. The next patriot or ruffian who kills or maims a policeman rather than compromise the right of public meeting will try what, from a speculative point of view, may be considered a valuable legal experiment which promises results most interesting to jurists. The experiment will, however, almost certainly be tried at the cost, according to the vigour of his proceedings, of either his freedom or his life.

NOTE V

THE MEANING OF AN "UNCONSTITUTIONAL" LAW

THE expression "unconstitutional" has, as applied to a law, at least three different meanings varying according to the nature of the constitution with reference to which it is used:—

(i.) The expression as applied to an English Act of Parliament, means simply that the Act in question, as, for instance, the Irish Church Act, 1869, is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the Act is either a breach of law or is void.

(ii.) The expression as applied to a law passed by the French Parliament, means that the law, *e.g.* extending the length of the President's tenure of office, is opposed to the articles of the constitution. The expression does not necessarily mean that the law in question is void, for it is by no means certain that any French Court will refuse to enforce a law because it is unconstitutional. The word would probably,

though not of necessity, be, when employed by a Frenchman, a term of censure.

(iii.) The expression, as applied to an Act of Congress, means simply that the Act is one beyond the power of Congress, and is therefore void. The word does not in this case necessarily import any censure whatever. An American might, without any inconsistency, say that an Act of Congress was a good law, that is, a law calculated in his opinion to benefit the country, but that unfortunately it was "unconstitutional," that is to say, *ultra vires* and void.

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